136

No. (1)

Supreme Court, U.S.
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In The
# Supreme Court of the United States

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## CHARLES C. APPLEBY,

*Petitioner,*

v.

## PETE GEREN,
## Secretary of the Army,

*Respondent.*

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## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is the D.C. Circuit's "unusually deferential" standard of review of military record correction board decisions unconstitutional as applied to claims that the military has violated the Constitution, statutes, or regulations?

2. Did the D.C. Circuit misapply the harmless error standard to the Army's violations of 10 U.S.C. § 14311?

3. Did the D.C. Circuit erroneously determine that Petitioner was retired from the Army for maximum years of service by operation of law?

## PARTIES TO THE PROCEEDING

The parties to the proceeding are Charles C. Appleby and Pete Geren, the Secretary of the Army. Francis J. Harvey, former Secretary of the Army, was the defendant in the U.S. District Court for the District of Columbia.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... vii

OPINION BELOW ..... 1

JURISDICTION ..... 1

STATUTORY AND REGULATORY PROVISIONS ..... 1

STATEMENT ..... 8

A. Factual Background ..... 9

B. Proceedings Below ..... 11

REASONS FOR GRANTING THE PETITION ..... 18

A. The D.C. Circuit's "Unusually Deferential" Standard of Review of ABCMR Decisions is Unconstitutional as Applied to Alleged Violations of the Constitution, Federal Statutes, and Regulations ..... 18

B. The D.C. Circuit Erroneously Applied the Harmless Error Standard ..... 26

C. The D.C. Circuit Erroneously Determined that Petitioner was Removed From the Promotion List By Operation of Law Under Senate Rule XXXI(6) and 10 U.S.C. § 14310(b) ..... 29

CONCLUSION ..... 34

APPENDIX:

Judgment and Memorandum Opinion of the United States Court of Appeals for the District of Columbia Circuit
entered May 8, 2009 ..... 1a

Amended Order of
the United States District Court for
the District of Columbia
entered May 29, 2007 ..... 9a

Memorandum Opinion of
the United States District Court for
the District of Columbia
entered May 29, 2007 ..... 11a

Letter to
Col. Charles C. Appleby (Ret) from
Carl W. S. Chun
Re: Army Board for Correction of Military
Records Record of Proceedings,
With Enclosures,
dated August 16, 2005.....50a

Enclosures:

1. Record of Proceedings of the
Army Board for Correction of
Military Records
dated August 11, 2005.....53a

2. Application for Correction of
Military Record Under the
Provisions of Title 10, U.S. Code,
Section 1552
dated March 23, 2004 .....77a

Department of Defense
Instruction No. 1320.4,
With Enclosures,
dated March 14, 1995.....83a

Enclosures:

1. GFO Documents Required
for Nomination,
With Attachments,
dated March 14, 1995 .....106a

Department of Defense
Instruction No. 1320.4,
With Enclosures,
dated March 14, 1995, continued;

Enclosures, continued;

2. O-6 and Below Documents for Nominations, With Attachment, dated March 14, 1995 ..... 115a

3. Adverse Information Cover Sheet dated March 14, 1995 ..... 120a

4. Sample Timeline Normal Processing, With Attachments, dated March 14, 1995 ..... 122a

5. Magnetic Tape/Floppy Disk Preparation and Transmittal Procedures, With Attachment, dated March 14, 1995 ..... 125a

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

*Adkins v. United States*,
68 F.3d 1317 (Fed. Cir. 1995) .....24

*Association of Civilian Technicians, Inc. v. United States*,
601 F. Supp. 2d 146
(D.D.C. March 4, 2009) .....20

*Bond v. United States*,
47 Fed. Cl. 641 (2000) .....25

*Chappell v. Wallace*,
462 U.S. 296 (1983) .....21

*Chevron v. Natural Resources Defense Council*,
467 U.S. 837 (1984) .....22, 24

*Conn. Nat'l Bank v. Germain*,
503 U.S. 249 (1992) .....21, 22

*Dickson v. Secretary of Defense*,
68 F.3d 1396 (D.C. Cir. 1995) .....29

*Dilley v. Alexander*,
603 F.2d 914 (D.C. Cir. 1979) .....20

*Dodson v. United States*,
988 F.2d 1199 (Fed. Cir. 1993).....24, 25, 28

*Epstein v. Geren*,
539 F. Supp. 2d 267 (D.D.C. 2008) ..... 20

*Fontana v. Caldera*,
160 F. Supp. 2d 122 (D.D.C. 2001) ..... 20

*Frizelle v. Slater*,
111 F.3d 172 (D.C. Cir. 1997) ..... 28, 29

*Jama v. Immigration and Customs Enforcement*,
543 U.S. 335 (2005) ..... 23

*Kreis v. Secretary of the Air Force*,
866 F.2d 1508 (D.C. Cir. 1989) ..... *passim*

*Lipsman v. Secretary of the Army*,
257 F. Supp. 2d 3 (D.D.C. 2003) ..... 23

*Marbury v. Madison*,
5 U.S. 137 (1803) ..... 21

*Murphy v. United States*,
993 F.2d 871 (Fed. Cir. 1993) ..... 24

*Process Gas Consumers Group v. U.S. Dep't of Agriculture*,
694 F.2d 778 (D.C. Cir. 1982) ..... 23

*Rolader v. United States*,
42 Fed. Cl. 782 (1999) ..... 25

*Rostker v. Goldberg*,
453 U.S. 57 (1981) ..... 21

*Skidmore et. al. v. Swift & Co.*,
323 U.S. 134 (1944) .....22

*Skinner v. United States*,
594 F.2d 824 (Cl. Ct. 1979) .....25

*Tenn. Valley Auth. v. Hill*,
437 U.S. 153 (1978) .....21

*United States v. Mead Corporation*,
533 U.S. 218 (2001) .....23

*Wagner v. United States*,
365 F.3d 1358 (Fed. Cir. 2004)..... 28-29

*Wisotsky v. United States*,
69 Fed. Cl. 299 (2006) .....29

**CONSTITUTIONAL PROVISION**

U.S. CONST. Art. I § 8 .....18

**STATUTES**

10 U.S.C. § 624(a)(1) .....29

10 U.S.C. § 1552.....1, 8, 20

10 U.S.C. § 1552(a)(1) .....18, 19

10 U.S.C. § 14310.....4, 12, 18

10 U.S.C. § 14310(a)..... 30

10 U.S.C. § 14310(b).....*passim*

10 U.S.C. § 14311 ..... *passim*

10 U.S.C. § 14311(c)(1) ..... *passim*

10 U.S.C. § 14311(c)(2) ..... *passim*

10 U.S.C. § 14507 ..... 7, 11, 18

10 U.S.C. § 14507(b) ..... 12, 14, 17, 31

28 U.S.C. § 1254(2) ..... 1

**REGULATION**

DoD Instruction 1320.4 ..... 8, 31, 33

**RULE**

SEN. R. XXXI(6) ..... 29, 30, 34

Mr. Charles C. Appleby, Colonel, U.S. Army Reserve (retired), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINION BELOW

The opinion of the U.S. Court of Appeals for the D.C. Circuit is reported as *Appleby v. Geren*, 2009 U.S. App. LEXIS 10043. The opinion of the U.S. District Court for the District of Columbia is reported as *Appleby v. Harvey*, 517 F. Supp. 2d 253 (D.D.C. 2007). The decision of the Army Board for the Correction of Military Records is provided in the Appendix at page 50a.

## JURISDICTION

The judgment of the court of appeals was entered on May 8, 2009. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(2).

## STATUTORY AND REGULATORY PROVISIONS

**10 U.S.C. § 1552.**

> § 1552. Correction of military records: Claims incident thereto
>
> (a)
>
> (1) The Secretary of a military department may correct any

military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Homeland Security may in the same manner correct any military record of the Coast Guard.

(2) The Secretary concerned is not required to act through a board in the case of the correction of a military record announcing a decision that a person is not eligible to enlist (or reenlist) or is not accepted for enlistment (or reenlistment) or announcing the promotion and appointment of an enlisted member to an initial or higher grade or the decision not to promote an enlisted member to a higher grade. Such a correction may be made only if the correction is favorable to the person concerned.

(3) Corrections under this section shall be made under procedures established by the Secretary

concerned. In the case of the Secretary of a military department, those procedures must be approved by the Secretary of Defense.

(4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

...

(g) In this section, the term "military record" means a document or other record that pertains to (1) an individual member or former member of the armed forces, or (2) at the discretion of the Secretary of the military department concerned, any other military matter affecting a member or former member of the armed forces, an employee or former employee of that military department, or a dependent or current or former spouse of any such person. Such term does not include records pertaining to civilian employment matters (such as matters covered by title 5 and chapters 81, 83, 87, 108, 373, 605, 607, 643, and 873 of this *title*).

**10 U.S.C. § 14310.**

§ 14310. Removal of officers from a list of officers recommended for promotion

(a) Removal by President. The President may remove the name of any officer from a promotion list at any time before the date on which the officer is promoted.

(b) Removal for withholding of Senate advice and consent. If the Senate does not give its advice and consent to the appointment to the next higher grade of an officer whose name is on a list of officers approved by the President for promotion (except in the case of promotions to a reserve grade to which appointments may be made by the President alone), the name of that officer shall be removed from the list.

**10 U.S.C. § 14311.**

§ 14311. Delay of promotion: involuntary

(a) Delay during investigations and proceedings.

(1) Under regulations prescribed by the Secretary of the military department concerned, the appointment of an officer to a higher grade may be delayed if any of the following applies before the date on which the appointment would otherwise be made:

(A) Sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and the charges have not been disposed of.

(B) An investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer.

...

(c) Notice to officer.

(1) The appointment of an officer to a higher grade may not be delayed under subsection (a) or (b) unless the officer is given written notice of the grounds for the delay. The preceding sentence does not apply if it is impracticable to give the officer written notice before the date on

which the appointment to the higher grade would otherwise take effect, but in such a case the written notice shall be given as soon as practicable.

(2) An officer whose promotion is delayed under subsection (a) or (b) shall be given an opportunity to make a written statement to the Secretary of the military department concerned in response to the action taken. The Secretary shall give consideration to any such statement.

(d) Maximum length of delay in promotion. The appointment of an officer to a higher grade may not be delayed under subsection (a) or (b) for more than six months after the date on which the officer would otherwise have been promoted unless the Secretary concerned specifies a further period of delay. An officer's appointment may not be delayed more than 90 days after final action has been taken in any criminal case against the officer in a Federal or State court of competent jurisdiction or more than 90 days after final action has been taken in any court-

martial case against the officer. Except for court action, a promotion may not be delayed more than 18 months after the date on which the officer would otherwise have been promoted.

**10 U.S.C. § 14507.**

§ 14507. Removal from the reserve active-status list for years of service: reserve lieutenant colonels and colonels of the Army, Air Force, and Marine Corps and reserve commanders and captains of the Navy.

(b) Colonels and Navy captains. Unless continued on the reserve active-status list under section 14701 or 14702 of this *title* or retained as provided in section 12646 or 12686 of this *title* each reserve officer of the Army, Air Force, or Marine Corps who holds the grade of colonel, and each reserve officer of the Navy who holds the grade of captain, and who is not on a list of officers recommended for promotion to the next higher grade shall (if not earlier removed from the reserve active-status list) be removed from that list under section 14514 of this *title* on the first day of the month after the month in

> which the officer completes 30 years of commissioned service. This subsection does not apply to the adjutant general or assistant adjutants general of a State.

The regulation applicable here is Department of Defense Instruction 1320.4, March 14, 1995, and is provided in the Appendix commencing on page 83a.

## STATEMENT

This case concerns an adverse decision by the U.S. Department of the Army Board for the Correction of Military Records ("ABCMR") a body established by Congress in 10 U.S.C. § 1552. The ABCMR denied Petitioner's application to correct his records to show that he was promoted to the rank of brigadier general and that his involuntary retirement for maximum years of service was unlawful. Appx. 50a-76a.

It appears that this Court has never directly reviewed a decision of the ABCMR or one of the other military record correction boards. This case presents a unique opportunity for it to do so. A key question presented by this petition affects virtually all petitions for judicial review of military records correction board decisions in the D.C. Circuit — whether the application of the judicially created "unusually deferential"[1] standard of review to

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[1] *See Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989).

ABCMR decisions involving claims of statutory violations is unconstitutional.

## A. Factual Background

Petitioner served honorably as a military officer for 30 years. He was selected for promotion to brigadier general, which the Secretary of Defense announced on July 27, 2000. Appx. 13a. The President approved Petitioner's promotion selection and placed his name on a promotion list, which, on September 13, 2000, was submitted to the Senate for confirmation. Appx. 13a.

On September 26, 2000, an anonymous complaint was made with the Inspector General, Florida Army National Guard (hereinafter "FLARNG"), alleging that Petitioner had reprised against the complainant for making a protected communication. The FLARNG forwarded the complaint to the Department of the Army Inspector General (hereinafter, "DAIG") on or around September 28, 2000. Appx. 13a-14a.

On October 3, 2000, the Adjutant General, FLARNG , informed Petitioner by telephone that he was being temporarily removed from the list of officers to be submitted to the U.S. Senate for confirmation of promotion to brigadier general. He did not tell Petitioner why. On October 6, 2000, the Deputy DAIG contacted Petitioner and advised him only that a reprisal complaint had been filed against him – neither identifying the complainant nor the facts or circumstances surrounding the basis for the complaint. Appx. 14a.

The Army, through the Secretary of Defense, temporarily withdrew Petitioner's name from the list of officers whose names were considered by the Senate for confirmation. No action was taken by the President of the United States to remove Petitioner's name from the list of officers recommended for promotion to brigadier general. Appx. 14a.

On January 31, 2001, the Vice Chief of Staff of the Army issued a Directive for Investigation, instructing the DAIG to investigate alleged improprieties by senior officials, including Petitioner. On June 28, 2001, the DAIG issued a Report of Investigation ("ROI"), which was approved the same day by the Vice Chief of Staff of the Army. The ROI substantiated three allegations against Petitioner: 1) he failed to ensure that a subordinate commander was properly relieved from a command position; 2) he improperly prepared and processed an annual Officer Evaluation Report; and 3) he reprised against two officers for making protected communications. Appx. 14a-15a.

On July 31, 2001, the Army transferred Petitioner to a retired status in the U.S. Army Reserve Control Group for maximum years of service (30 years). Appx. 15a. On October 19, 2001, based on the DAIG investigation, the Vice Chief of Staff of the Army issued Petitioner a non-punitive Memorandum of Concern ("MOC"). The MOC was not filed in Petitioner's Official Military Personnel File. There was no permanent record of the MOC and it was not distributed to anyone within the Army other than COL Appleby. Appx. 15a-16a.

The DAIG ROI noted the original reprisal was unsubstantiated and further that Petitioner had not actually reprised against the two officers (not the subject of the original complaint), and that its finding of reprisal was based on possible future actions by Petitioner. C. A. Joint Appx. 213. The DAIG also noted that Petitioner acted on incorrect legal advice he received. Had he received correct legal advice, the DAIG concluded, the incidents would not have occurred. Petitioner thus lost his promotion based on actions he did not take. The other two substantiated allegations were trivial.

## B. Proceedings Below

Petitioner applied to the ABCMR and alleged, *inter alia*, that the Army had violated 10 U.S.C. § 14311, which governed his promotion and its delay. He contended that he was deprived of due process of law because the Army failed to inform him in writing of the grounds for the delay and provide him an opportunity to respond in writing to the Secretary of the Army, who was obligated to consider the submission, as mandated by 10 U.S.C. § 14311(c)(1) and (2). Appx. 58a. He further argued that his involuntary retirement for maximum years of service violated 10 U.S.C. § 14507. The National Guard Bureau , ("NGB") provided the ABCMR an advisory opinion in which it recommended that Petitioner's name be returned to the Senate for confirmation and, if confirmed, promoted retroactively to the rank of Brigadier General. Appx. 64a.

In response to Petitioner's claim that Respondent violated his right to notice and comment under 10 U.S.C. § 14311, the ABCMR stated:

> The evidence surrounding the applicant's notification of removal from the confirmation list, or the lack thereof, is not present in the available evidence; however, the applicant acknowledges that he was notified telephonically by senior officials. While the lack of written notification is not condoned, there is no evidence submitted by the applicant with his application to support that contention or evidence of any harm that resulted from his telephonic notification vice written notification.

Appx. 72a-73a. The ABCMR did not address Petitioner's contention that the Army failed to advise him of his right under 10 U.S.C. § 14311(c)(2) to submit a written response to the Secretary of the Army regarding the delay of his promotion.

Petitioner further argued that his retirement for maximum years of service was unlawful under 10 U.S.C. § 14507(b) because he remained on a promotion list at all relevant times. He was never removed from the promotion list as required by 10 U.S.C. § 14310. In response to this claim, the ABCMR concluded:

> Not withstanding the favorable advisory opinions obtained from the NGB which opine that applicant's nomination should have then and should be now forwarded to the Senate for consideration for confirmation, by the time the investigation was completed and his nomination/records could have been reviewed by a PRB, he would have reached his maximum years of service and the result would have been the same even if it had been submitted the day the investigation was completed.

Appx. 75a. Petitioner then sought judicial review in the U.S. District Court for the District of Columbia. The district court applied the "unusually deferential" standard of review of *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989), to Petitioner's claims of statutory violations. Appx. 21a. In response to Petitioner's argument that the ABCMR erred in rejecting his claims under 10 U.S.C. § 14311, the district court held:

> And as the ABCMR noted, "[w]hile lack of written notification is not condoned, there is no evidence submitted by the applicant with his application to support [the contention that he was not advised of the action being taken] or evidence of harm that resulted from his telephonic notification vice written notification."

> ... Although the ABCMR did not specifically address the plaintiff's contention that he was not provided the opportunity to respond in writing to the Secretary, it is reasonable to infer that once the plaintiff was notified of the charges against him, he had the opportunity to respond in writing "in response to the action taken." 10 U.S.C. § 14311(c).

Appx. 39a. The district court also considered Petitioner's claim that his retirement under 10 U.S.C. § 14507(b) was unlawful. According to the district court:

> Commenting on this situation, the ABCMR stated: While it [was] unfortunate that the applicant reached his maximum years of service before he could be reconsidered for promotion, the evidence does not suggest that there was any conspiracy or specific effort to deny him an opportunity to be reconsidered for promotion. The clock simply ran out on him as it does many officers in similar circumstances. Admin. R. at 163. The Court cannot take exception to this observation, and accordingly, the defendant is entitled to summary judgment on Count IX of the complaint and summary judgment for the plaintiff on this count is denied.

Appx. 47a-48a. Petitioner then filed an appeal in the D.C. Circuit in which he alleged: (1) the district court misapplied and, on some counts, failed to apply, the Administrative Procedure Act standards of review; (2) the Army violated 10 U.S.C. § 14311 by failing to notify him in writing of the grounds for the delay of his promotion and of his right to respond in writing to he secretary of the army; (3) the Army violated 10 U.S.C. § 14311 by failing to obtain secretary of the Army approval for delaying his promotion beyond the authorized period; and (4) the ABCMR and the district court erred in concluding that he was lawfully retired.

The D.C. Circuit did not address Petitioner's argument that the unusually deferential standard of review was unconstitutional as applied to claims that the military has violated the Constitution, statutes, or lawful regulation. Rather, it applied the standard, noting that "[e]ven in the face of an 'undisputed error' or 'conceded injustice,' we must deny the petition for review if the Board offered an adequate explanation 'that a court can measure.'" Appx. 3a (citing *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989)).

In response to Petitioner's claim that his promotion delay was unlawful under 10 U.S.C. § 14311(c)(1) because the Army failed to inform him in writing of the grounds for the delay, the D.C. Circuit ruled:

> Appleby, whose nomination was then pending before the Senate, received two telephone calls in October 2000 informing him of the whistleblower complaint and of the delay. The Board concluded that Appleby had not shown 'evidence of any harm that resulted from his telephonic notification vice written notification.' Appleby gives us no cause to disturb that reasonable judgment as to the medium of notification.

Appx. 4a. The D.C. Circuit also addressed Petitioner's claim that the Army failed to give him an opportunity to respond in writing to the Secretary of the Army in response to the promotion delay, as required by 10 U.S.C. § 14311(c)(2). According to the court:

> Appleby argues the Army's failure to notify him of his right to respond in writing to the Secretary of the Army robbed him of the opportunity to obtain and submit evidence with which to refute or mitigate the allegations against him. The Board found there was 'no evidence of any harm' caused by 'telephonic notification vice written notification'; in other words, having been informed of the delay, Appleby had an adequate opportunity to respond to it.

Appx. 4a-5a. The D.C. Circuit further noted:

> On November 3, 2000 Appleby sent a memorandum to the Assistant Adjutant General of the Florida Army National Guard requesting a review of attached documents detailing the conduct that was the subject of the pending investigation. Appleby, who may not have then known the source of the complaint, nonetheless had an opportunity to submit evidence regarding the subject matter of the investigation that triggered the delay. The Assistant Adjutant General responded on December 4, 2000 and included with his response a memorandum naming one of Appleby's subordinates as a possible complainant against him. In light of this evidence, we cannot say the Board was unreasonable in concluding any error in notification was harmless.

Appx. 5a. In response to Petitioner's claim that his retirement under 10 U.S.C. § 14507(b) was unlawful, the D.C. Circuit ruled (Appx. 8a):

> Appleby's final argument is that he was not lawfully retired pursuant to 10 U.S.C. § 14507(b) because his name was never removed from the promotion list under 10 U.S.C. § 14310. If, however, after the President nominates an officer whose name is on the promotion list to the Senate, the Senate returns that nomination to the President, then the

> officer's name is removed from the promotion list by operation of law, which occurred here. Hence the Board reasonably concluded that the 'clock simply ran out on' Appleby's hope for a promotion when he was lawfully retired from the National Guard on July 31, 2001.

## REASONS FOR GRANTING THE PETITION

### A. The D.C. Circuit's "Unusually Deferential" Standard of Review of ABCMR Decisions is Unconstitutional as Applied to Alleged Violations of the Constitution, Federal Statutes, and Regulations.

The D.C. Circuit in this case was called upon to determine whether the Army complied with 10 U.S.C. § 14311, which governed the delay of Petitioner's promotion to brigadier general, 10 U.S.C. § 14310, and 10 U.S.C. § 14507, under which he purportedly was retired for maximum years of service. Each statute is an unambiguous exercise of the plenary powers of Congress to regulate the armed forces under the Constitution. *U.S. Const. art. I, § 8.*

10 U.S.C. § 1552(a)(1) states that "[t]he Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." The secretaries may do so acting through boards of civilians of that military

department. *Id.* The discretion Congress afforded the military secretaries in that section is the basis for the "unusually deferential" standard of review applied by the D.C. Circuit in this case:

> It is simply more difficult to say that the Secretary has acted arbitrarily if he is authorized to act '*when he considers it necessary to remove an error or injustice*,' 10 U.S.C. § 1552(a) (emphasis added), than if he is required to act whenever a court determines that certain objective conditions are met, i.e., that there has been an error or injustice.

*Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989). This ruling reduced judicial review of Petitioner's claims to a mere formality and permitted plainly unlawful conduct by Respondent to pass unchallenged.

*Kreis*, as applied here, directly conflicts with a previous decision of the D.C. Circuit in which it held that the deference Congress accorded the correction boards in 10 U.S.C. § 1552(a)(1) does not relieve them of their duty to obey the law:

> Although this provision gives the Corrections Board broad discretion to remedy errors in military records, it does not entitle the board to violate express statutory directives in doing so.

*Dilley v. Alexander*, 603 F.2d 914, 924, n. 20 (D.C. Cir. 1979). *Kreis* did not purport to overrule *Dilley*, which is the correct statement of the law. And Congress could not have sought through 10 U.S.C. § 1552 to grant the military secretaries discretion to comply with federal statutes or military regulations. Yet the D.C. Circuit accomplished just that in this case.

The D.C. Circuit's application of *Kreis* in this case directly conflicts with decisions of the district court, which have declined to apply it to an agency's interpretation of statutes and regulations. In *Fontana v. Caldera*, 160 F. Supp. 2d 122, 131 (D.D.C. 2001), the district court affirmed that *Kreis* applies to "a reviewable exercise of agency discretion, not an agency's interpretation of its statutes and regulations." *See also Association of Civilian Technicians, Inc. v. United States*, 601 F. Supp. 2d 146, 166 n. 17 (D.D.C. March 4, 2009) (No judicial deference owed to agency interpretations of statutes and regulations); and *Epstein v. Geren*, 539 F. Supp. 2d 267, 275 (D.D.C. 2008) (Where statutory and regulatory violations are alleged, the traditional APA standard of review applies).

Those decisions are harmonious with the plenary authority over military affairs given to Congress in the Constitution. As this Court stated in *Chappell v. Wallace*, 462 U.S. 296, 301 (1983):

> It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment including regulations, procedures, and remedies related to military discipline; and Congress and the courts have acted in conformity with that view.

This Court has emphasized that judicial deference to Congress is perhaps greatest "in the context of Congress' authority over national defense and military affairs..." *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981). A judge-made rule of deference that permits a court to avoid giving effect to an unambiguous statute therefore is constitutionally impermissible. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). "Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978). "Courts must presume that [Congress] says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)) (internal citations omitted). "When the words of a

statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.*

The D.C. Circuit's sweeping application of the "unusually deferential" standard also is incompatible with this Court's doctrine of judicial deference to agency decisions. In *Skidmore et. al. v. Swift & Co.*, 323 U.S. 134, 140 (1944), the Court held that where a statute is ambiguous or indicates congressional intent to delegate general authority to make rules with force of law, courts may give deference to "rulings, interpretations and opinions" of the agency:

> The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

*Id.* In *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), the Court clarified that:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the

> unambiguously expressed intent of Congress.

As the Court explained in *United States v. Mead Corporation*, 533 U.S. 218, 231 (2001):

> *Chevron* was simply a case recognizing that even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation present a particularly insistent call for deference.

Judicial deference thus is "a function of Congress' intent." *Process Gas Consumers Group v. U.S. Dep't of Agriculture*, 694 F.2d 778, 791 (D.C. Cir. 1982) (en banc).

Under this Court's doctrine of judicial deference, then, no deference is permitted where there is no ambiguity in the applicable statutes or regulations and no legislative delegation of general rule-making authority. In this case, Congress spoke directly and unambiguously to the issues at hand. It did not delegate, explicitly or implicitly, interpretive authority to the military secretaries or their record correction boards. The question for the lower courts, then, was "not how much discretion we think the Executive ought to have, but how much discretion Congress has chosen to give it." *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 368 (2005) (Souter, J., dissenting). *See also Lipsman v. Secretary of the Army*, 257 F. Supp. 2d 3, 8 (D.D.C. 2003) (Where, as here, "an agency shares responsibility for the administration of a statute

with other agencies, the court owes the agency's statutory interpretation no *Chevron* deference").

The Federal Circuit, which also has notable expertise in military law matters, eschews the "unusually deferential" approach of *Kreis* when reviewing claims involving "plain legal error," which the court understands to mean "... the military's 'violation of statute, or regulation, or published mandatory procedure, or unauthorized act.'" *Dodson v. United States*, 988 F.2d 1199, 1204 (Fed. Cir. 1993) (quotation and citation omitted). The position of the Federal Circuit is that "[a] court may appropriately decide whether the military followed procedures because by their nature the procedures limit the military's discretion." *Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993). It does so without deference. As explained in *Adkins v. United States*, 68 F.3d 1317, 1323 (Fed. Cir. 1995) (citation omitted):

> In cases in which procedural violations are alleged, the tests or standards against which this court measures the military's conduct are inherent: they are the applicable statutes and regulations. In such instances, this court does not improperly exercise any discretion reserved for the military; 'it merely determines whether the procedures were followed by applying the facts to the statutory or regulatory standard.'

The U.S. Court of Federal Claims has similarly noted:

> The integrity and objectivity of the [military personnel] rating system go to the very heart of the military establishment's effectiveness, and all we do here is to preserve it as the statutes and authorized procedures contemplate and mandate. This does not make the court a super correction board. We are only discharging our own statutory duties.

*Skinner v. United States*, 594 F.2d 824, 830 (Cl. Ct. 1979) (emphasis added). *See also Bond v. United States*, 47 Fed. Cl. 641, 662 (2000) (Failure to comply with mandatory, regulatory classification scheme was legal error); *Rolader v. United States*, 42 Fed. Cl. 782, 786 (1999) (Failure to follow regulations in promotion delay reversible error); and *Dodson v. United States*, 988 F.2d 1199, 1206 (Fed. Cir. 1993) (ABCMR's "mere consideration of a defective personnel decision does not cure the defect").

That is the approach mandated by this Court and the Constitution. Certiorari should be granted to consider the constitutionality of *Kreis* and its application to claims of constitutional, statutory, and regulatory violations. Certiorari also should be granted to harmonize the differing approaches of the D.C. Circuit and the Federal Circuit to such claims.

## B. The D.C. Circuit Erroneously Applied the Harmless Error Standard.

Petitioner argued that the Army's failure to notify him in writing of the grounds for the delay and afford him an opportunity to respond to the Secretary of the Army was severely prejudicial because it deprived him of his only opportunity to terminate the promotion delay before he allegedly reached his maximum years of service, and thus avoid involuntary retirement. Appx. 4a.

Had Petitioner received the process due under 10 U.S.C. § 14311(c)(1) and (2), he could have obtained and submitted evidence demonstrating that the allegations under investigation were baseless or mitigated such that his promotion should continue. In particular, he could have submitted to the Secretary the several investigations that he had ordered into the complaining officer's conduct and the legal advice he had received concerning that conduct. C. A. Joint Appx. 169-98. As the DAIG concluded:

> Proper legal advice would have prevented these incidences from occurring. Furthermore, the substantiation of this allegation was based upon the possible affect of future unfavorable actions. However, [Petitioner] did not take any unfavorable actions.

C. A. Joint Appx. 213. The D.C. Circuit, like the district court, determined that the Army's failure to comply with 10 U.S.C. § 14311(c)(1) and (2) was harmless error. Appx. 5a. The courts based their conclusion on the irrelevant facts that Petitioner had requested that the Assistant Adjutant General, FLARNG, conduct a review of the actions that triggered his promotion delay, and the Assistant Adjutant General had responded to Petitioner. Appx. 5a. According to the D.C. Circuit, "[i]n light of this evidence, we cannot say the Board was unreasonable in concluding that any error in notification was harmless." Appx. 5a.

Petitioner's communications with the Assistant Adjutant General of the FLARNG bore no relationship to the right of notice and response provided by 10 U.S.C. § 14311(c)(1) and (2). The Assistant Adjutant General is not the Secretary of the Army and in fact was far-removed from the Secretary. Petitioner sought through those communications an assessment by higher FLARNG authority of the appropriateness of the actions he had taken. C. A. Joint Appx. 192-94. He was not responding to the Secretary concerning the delay of his promotion. The information Petitioner provided the Assistant Adjutant General was never forwarded to the Secretary.

The D.C. Circuit also could have reasonably concluded, as Petitioner argued, that the Secretary may have chosen to permit his promotion to continue. There was ample evidence to support that conclusion: (1) Petitioner's superlative record of military service; (2) the DAIG's dismissal of the

initial whistleblower allegation; (3) Petitioner's thorough investigations of the complaining officer's conduct; (4) his receipt of erroneous legal advice; and (5) the importance of the position he was selected to occupy. Be that as it may, the proper action was to remand the matter to the ABCMR for further consideration.

There are few decided cases concerning officer promotion delays, and none specify a standard for measuring prejudicial error concerning the loss of an opportunity to address directly the Secretary of the Army. The most comparable cases are those involving promotion denials. In that context, the D.C. Circuit has stated that the ABCMR must consider not whether the officer would have been promoted, but whether promotion was not definitely unlikely or excluded. *Frizelle v. Slater*, 111 F.3d 172, 179 (D.C. Cir. 1997). The Federal Circuit has adopted a similar view: "A soldier seeking correction of his records need not prove that, had his records been correct, the adverse personnel action would not have occurred. In other words, the test is not 'but for.'" *Dodson*, 988 F.2d at 1205.

The harmless error standard thus required the D.C. Circuit to ascertain whether the Secretary might have terminated the delay of Petitioner's promotion had the Army complied with 10 U.S.C. § 14311(c)(2). Remand of that issue to the ABCMR was the appropriate response because where the effect of an error is unquantifiable, or unknowable, courts should not "speculate as to what the outcome might have been had the error not occurred." *Wagner v. United States*, 365 F.3d 1358, 1364-65

(Fed. Cir. 2004). *See also Wisotsky v. United States*, 69 Fed. Cl. 299, 307-08 (2006).

Remand also was required because the ABCMR did not address Petitioner's claim that he was deprived of his right to respond to the Secretary of the Army under 10 U.S.C. § 14311(c)(2). Appx. 39a. *See Frizelle*, 11 F.3d at 177 ("However, because the Board's decision did not respond to two of Frizelle's arguments, which do not appear frivolous on their face and could affect the Board's ultimate disposition, we conclude that the Board's decision was arbitrary"). *See also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405-06 (D.C. Cir. 1995) (citation omitted) ("A reviewing court 'may not supply a reasoned basis for the agency's decision that the agency itself has not given'").

Certiorari should be granted to clarify the harmless error standard applicable in the circumstances of this case.

### C. The D.C. Circuit Erroneously Determined that Petitioner was Removed From the Promotion List By Operation of Law Under Senate Rule XXXI(6) and 10 U.S.C. § 14310(b).

Petitioner was selected for promotion to brigadier general. Appx. 13a, 61a. His selection was reviewed and forwarded by the Secretary of the Army and the Secretary of the Defense to the President for placement on a "promotion list." *See* 10 U.S.C. § 624(a)(1). The President then forwarded the promotion list that included Petitioner's name to

the Senate for advice and consent. Appx. 13a. The Secretary of Defense then requested that the Senate temporarily withhold Petitioner's name from the list of officers receiving its advice and consent. Appx. 62a. The Senate did not consider Petitioner's name, which was not on the list of officers before it.

On those facts, the D.C. Circuit found that Petitioner's name was removed by operation of law on December 15, 2000 when it "returned Appleby's nomination to the President pursuant to Senate Rule XXXI(6) ('if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acting upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not be again considered unless they shall again be made to the Senate by the President')." Appx. 6a.

Yet Petitioner's name had been withheld from the list of officers considered by the Senate on or around October 6, 2000. Appx. 62a. Senate Rule XXXI(6) therefore had no bearing on Petitioner's promotion. The Senate did not fail to give its advice and consent because it recessed on December 15, 2000; rather, it had no opportunity to give its advice and consent. Petitioner's name was not before the Senate on December 15, 2000.

Petitioner could be removed from the promotion list only pursuant to 10 U.S.C. § 14310(a) and (b). Section 14310(a) provides: "The President may remove the name of any officer from a promotion list at any time before the date on which the officer is promoted." Section 14310(b) provides:

> If the Senate does not give its advice and consent to the appointment to the next higher grade of an officer whose name is on a list of officers approved by the President for promotion (except in the case of promotions to a reserve grade to which appointments may be made by the President alone), the name of that officer shall be removed from the list.

It is undisputed that the President did not remove Petitioner's name from the promotion list. Because the Senate never considered Petitioner's name, his name was not removed from the promotion list pursuant to section 14310(b). Rather, he remained on the promotion list at the time of his involuntary retirement on July 31, 2001. Petitioner therefore was not subject to the mandatory retirement provisions of 10 U.S.C. § 14507(b), and his involuntary retirement was unlawful.

Petitioner's argument is fully supported by Department of Defense Directive 1320.4. Appx. 83a. Section 6.2.1.6 governs the procedures followed where adverse information is presented concerning nominations that "have been received by the Senate, but not yet confirmed." Appx. 95a. Section 6.2.1.7 then provides:

> In those cases where the officer(s) identified with adverse or alleged adverse information is on a promotion list as outlined in subparagraph 6.2.1.6., above, the ASD(FMP), with the

> verbal concurrence of the Director, WHMO, and the Executive Secretary of the Department of Defense shall advise the SASC, and ask it to defer nomination of the officer(s) concerned while permitting the remaining officers on the list to continue forward for confirmation.

Appx. 96a. Section 6.2.1.8 further states:

> When an investigation or inquiry is completed on an officer(s) whose nomination is on hold at the SASC under subparagraph 6.2.1.6., above, the Secretary of the Military Department concerned shall so inform the Secretary of Defense, through the ASD(FMP), in writing. The Secretary of the Military Department's notification shall state if the allegations were substantiated, what action was taken, if any, and whether or not the Secretary of the Military Department still supports the nomination. In those cases where the allegation is substantiated and the Secretary of the Military Department and the Secretary of Defense support the nomination, that nomination shall be processed for approval to the President. If the President continues to support the nomination, the ASD(FMP) shall advise the SASC to proceed with the confirmation process.

Appx. 96a-97a. Considering those provisions, the D.C. Circuit concluded:

> If, however, after the President nominates an officer whose name is on the promotion list to the Senate, the Senate returns that nomination to the President, then the officer's name is removed from the promotion list by operation of law, which occurred here.

Appx. 8a. The record evidence shows, however, that the Senate never returned Petitioner's nomination to the President. Rather, the nomination was withheld from the list that the Senate did consider, and remained in a "hold" status at the Senate Armed Service Committee. Department of Defense Instruction 1320.4, Section 6.2.1.8, addresses that very circumstance:

> In those cases where the allegation is substantiated and the Secretary of the Military Department and the Secretary of Defense support the nomination, that nomination shall be processed for approval to the President. If the President continues to support the nomination, the ASD(FMP) shall advise the SASC to proceed with the confirmation process.

Appx. 96a-97a. If the D.C. Circuit were correct, the procedures of Section 6.2.1.8 would be otiose. Congress, in 10 U.S.C. § 14310(b), clearly was addressing the situation where an officer failed to

secure the advice and consent of the Senate after being considered by the Senate, not where the Senate never considered the officer.

Even if the D.C. Circuit were correct, Petitioner was still entitled to relief based on the Army's violations of 10 U.S.C. § 14311(c)(1) and (2). The consequence of those violations should be that because Petitioner's promotion was never in fact delayed, he remained on the promotion list at all times, and his removal, whether by Senate Rule XXXI(6) or 10 U.S.C. § 14310(b), was null and void. Certiorari should be granted.

## CONCLUSION

For the foregoing reasons, Petitioner, Charles C. Appleby, prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the D.C. Circuit.

Respectfully submitted,

*/s/*

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August 6, 2009

No. _____

In The
# Supreme Court of the United States

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## CHARLES C. APPLEBY,

*Petitioner,*

v.

## PETE GEREN,
## Secretary of the Army,

*Respondent.*

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## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

Page

Judgment and Memorandum Opinion of the United States Court of Appeals for the District of Columbia Circuit
entered May 8, 2009 ..... 1a

Amended Order of
the United States District Court for
the District of Columbia
entered May 29, 2007 ..... 9a

Memorandum Opinion of
the United States District Court for
the District of Columbia
entered May 29, 2007 ..... 11a

Letter to
Col. Charles C. Appleby (Ret) from
Carl W. S. Chun
Re: Army Board for Correction of Military Records Record of Proceedings,
With Enclosures,
dated August 16, 2005 ..... 50a

Enclosures:

1. Record of Proceedings of the Army Board for Correction of Military Records
dated August 11, 2005 ..... 53a

Letter to
Col. Charles C. Appleby (Ret) from
Carl W. S. Chun
Re: Army Board for Correction of Military
Records Record of Proceedings,
With Enclosures,
dated August 16, 2005, continued;

Enclosures, continued;

2. Application for Correction of
Military Record Under the
Provisions of Title 10, U.S. Code,
Section 1552
dated March 23, 2004 ..... 77a

Department of Defense
Instruction No. 1320.4,
With Enclosures,
dated March 14, 1995 ..... 83a

Enclosures:

1. GFO Documents Required
for Nomination,
With Attachments,
dated March 14, 1995 ..... 106a

2. O-6 and Below Documents
for Nominations,
With Attachment,
dated March 14, 1995 ..... 115a

Department of Defense
Instruction No. 1320.4,
With Enclosures,
dated March 14, 1995, continued;

Enclosures, continued;

3. Adverse Information
Cover Sheet
dated March 14, 1995 .....120a

4. Sample Timeline
Normal Processing,
With Attachments,
dated March 14, 1995 .....122a

5. Magnetic Tape/Floppy
Disk Preparation and
Transmittal Procedures,
With Attachment,
dated March 14, 1995 .....125a

**United States Court of Appeals**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 08-5226** **September Term, 2008**
**Filed On: May 8, 2009**

CHARLES C. APPLEBY,
APPELLANT

v.

PETE GEREN, SECRETARY OF THE ARMY,
APPELLEE

---

Appeal from the United States District Court
for the District of Columbia
(No. 06-cv-0193-RBW)

---

Before: GINSBURG, HENDERSON and KAVANAUGH, *Circuit Judges*.

**JUDGMENT**

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties. It is

**ORDERED AND ADJUDGED** that the judgment of the District Court be affirmed for the reasons given in the attached memorandum opinion.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

## MEMORANDUM OPINION

In 2003 Charles Appleby, believing that prior to his retirement he had been unlawfully denied an opportunity for a promotion within the Florida Army National Guard, sought retroactive promotion from the Army Board for the Correction of Military Records. When the Board denied his application, Appleby challenged its decision in the district court pursuant to the Administrative Procedure Act. The district court granted summary judgment to the Army with respect to the three claims at issue in this appeal. The relevant facts, which are canvassed in the opinions of the Board and of the district court, are undisputed. Reviewing the matter *de novo*, *see Kreis v. Sec'y of Air Force*, 406 F.3d 684, 685 (D.C. Cir. 2005), we affirm the judgment of the district court because the Board reasonably exercised its discretion not to grant Appleby's application.

The Secretary of the Army, acting through a board of correction, "may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). Because the Secretary has the discretion not to correct a record if he does not "consider[] it necessary" to do so, *id.*, we apply an "unusually deferential" version of the "'arbitrary or capricious' standard" of the APA to the Board's denial of Appleby's application. *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1514 (D.C. Cir. 1989). Even in the face of an "undisputed error" or "conceded injustice," we must deny the petition for review if the Board offered an adequate explanation "that a court can measure." *Id.*

Appleby first claims the Board should have granted his application because the Army violated 10 U.S.C. § 14311(c) when it failed to give him adequate notification that the Secretary of Defense had decided to ask the Senate to withhold consideration of his nomination pending resolution of an investigation into Appleby's alleged reprisal against a whistleblower. His argument raises two issues. First, § 14311(c)(1) requires the Army to "give[] written notice of the grounds for the delay" of a promotion. Appleby, whose nomination was then pending before the Senate, received two telephone calls in October 2000 informing him of the whistleblower complaint and of the delay. The Board concluded Appleby had not shown "evidence of any harm that resulted from his telephonic notification vice written notification." Appleby gives us no cause to disturb that reasonable judgment as to the medium of notification.

Second, Appleby challenges the adequacy of the message he received, citing § 14311(c)(2) of the statute, which provides, "An officer whose promotion is delayed ... shall be given an opportunity to make a written statement to the Secretary of the military department concerned in response to the action taken. The Secretary shall give consideration to any such statement." Appleby argues the Army's failure to notify him of his right to respond in writing to the Secretary of the Army robbed him of the opportunity to obtain and submit evidence with which to refute or mitigate the allegations against him. The Board found there was no "evidence of any harm" caused by "telephonic notification vice written notification"; in other words, having been informed of the delay,

Appleby had an adequate opportunity to respond to it. *See Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 (D.C. Cir. 1995) (court must defer to Board if its "path may reasonably be discerned" from its order (internal quotation marks omitted)).

Be that as it may, we note the Board's assessment was consistent with the statute. Section 14311(c)(1) specifies the requisite notice must communicate "the grounds for the delay." 10 U.S.C. § 14311(c)(1). Section 14311(c)(2) says nothing further about notice but instead requires the Secretary of the Army to "give[] [the officer] an opportunity" to respond to the delay and to consider the officer's response.

On November 3, 2000 Appleby sent a memorandum to the Assistant Adjutant General of the Florida Army National Guard requesting a review of attached documents detailing the conduct that was the subject of the pending investigation. Appleby, who may not then have known the source of the complaint, nonetheless had an opportunity to submit evidence regarding the subject matter of the investigation that triggered the delay. The Assistant Adjutant General responded on December 4, 2000 and included with his response a memorandum naming one of Appleby's subordinates as a possible complainant against him. In the light of this evidence, we cannot say the Board was unreasonable in concluding any error in notification was harmless.

After it decided the initial allegations could not be substantiated, the Army pursued a new investigation from January to June 2001, but that did not prejudice Appleby's cause because the Senate had on December 15, 2000 returned Appleby's nomination to the President pursuant to Senate Rule XXXI(6) ("if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President"). Therefore, Appleby's name was removed from the promotion list by operation of law. *See* 10 U.S.C. § 14310(b). Because Appleby's nomination was not pending after December 2000, the 2001 investigation did not "delay" his promotion within the meaning of 10 U.S.C. § 14311. Consequently, we need not consider whether Appleby had adequate notice of the new allegations.

Appleby also argues the Secretary of Defense improperly delayed his promotion when the Secretary asked the Senate in October 2000 to withhold action pending completion of the original investigation. Section 14311(d) of the statute prohibits a delay of an "appointment of an officer to a higher grade ... for more than six months after the date on which the officer would otherwise have been promoted unless the Secretary concerned specifies a further period of delay," *id.* § 14311(d). Because the Army could have delayed Appleby's promotion for six months without secretarial authorization, Appleby cannot show the statute was violated by the two-

and-a-half month delay that occurred before the Senate returned his nomination to the President without having acted upon it.

We believe, moreover, the Board reasonably declined to correct any error by the Army after concluding the delay was not "undue" or "unnecessary." Although the statute indicates the Secretary of the Army, as the "Secretary concerned," should have been the one to authorize the delay, *see id.*; *id.* § 101(a)(9)(A), he answers to the Secretary of Defense, and Appleby has given us no reason to think the Secretary of the Army would have taken a position different from that of his superior. Therefore, even if the Board was incorrect in concluding the delay was lawful in all respects, any error was harmless. *See Air Canada v. DOT*, 148 F.3d 1142, 1156–57 (D.C. Cir. 1998).

Appleby also contends the statute prohibits the Secretary from delaying a promotion for an open-ended period, that is, one measured not by a calendar date but by a future condition or event. As to this issue, the Board correctly concluded "the evidence suggests that his nomination was properly withheld from the Senate in accordance with" Instruction 1320.4, Military Officer Actions Requiring Approval of the Secretary of Defense or the President, or Confirmation by the Senate (Dep't of Def. Mar. 14, 1995), which implements Title 10 of the United States Code. The evidence before the Board, upon which it implicitly relied, included advisory opinions by the General Officer Management Office and by the National Guard, both of which determined the Secretary's action was

lawful. The key statutory text -- "a further period of delay," 10 U.S.C. § 14311(d) -- does not foreclose the reasonable interpretation of the Secretary of Defense that the statute permits the Army to measure a "period" by a condition or event, and to institute a delay without specifying a further period once the statutory limit of six months has been reached. Therefore, the Board did not err in determining the period of the delay was lawful.

Appleby's final argument is that he was not lawfully retired pursuant to 10 U.S.C. § 14507(b) because his name was never removed from the promotion list under 10 U.S.C. § 14310. If, however, after the President nominates an officer whose name is on the promotion list to the Senate, the Senate returns that nomination to the President, then the officer's name is removed from the promotion list by operation of law, which occurred here. Hence, the Board reasonably concluded the "clock simply ran out on" Appleby's hope for a promotion when he was lawfully retired from the National Guard on July 31, 2001.

For the foregoing reasons, we affirm the judgment of the district court in favor of the Army.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| CHARLES APPLEBY, | : | |
| | : | |
| Plaintiff, | : | Civil Action No.. 06-0193 (RBW) |
| | : | |
| v. | : | |
| | : | |
| THE HONORABLE FRANCIS HARVEY, SECRETARY OF THE ARMY, | : | |
| | : | |
| Defendant. | : | |

AMENDED ORDER

In accordance with the Memorandum Opinion being issued contemporaneously with this Amended Order, it is hereby

ORDERED that the defendant's Motion to Dismiss in Part and for Summary Judgment [D.E. #13] is granted in part and denied in part. Accordingly, Counts I, II, and III of the complaint are dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state claims upon which relief can be granted and the defendant's motion to dismiss Count VIII of the Complaint is denied without prejudice pending review of the allegations asserted in this count by the Secretary of the Army. It is further

ORDERED that summary judgment is awarded to the defendants on Counts IV, V, VI, VII, and IX of the complaint. It is further

ORDERED that the Plaintiff's Cross-Motion for Summary Judgment [D.E. #17] is denied with respect to Counts I through VII and IX, and granted as to Count VIII.

SO ORDERED on this 29th day of May, 2007.

REGGIE B. WALTON
United States District Judge

[FILED: MAY 29, 2007]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| CHARLES APPLEBY, | : | |
| | : | |
| Plaintiff, | : | |
| | : | Civil Action No. |
| v. | : | 06-0193 (RBW) |
| | : | |
| THE HONORABLE FRANCIS HARVEY, SECRETARY OF THE ARMY, | : | |
| | : | |
| Defendant. | : | |

MEMORANDUM OPINION

The plaintiff, a retired Florida Army National Guard ("FLARNG") officer, brings this action under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (2000), seeking review of a decision issued by the Army Board for the Correction of Military Records ("ABCMR" or "Board") for alleged violations of the United States Constitution, United States military regulations, and federal statutory law. Complaint ("Compl.") at 1. The plaintiff requests that this Court order the Secretary of the Army to expunge from his military record all documents referencing a Department of the Army Inspector General ("DAIG") investigation and all documents related to the decision to withhold his name from placement on the Brigadier General Promotion List.

Compl. at 34. The plaintiff also requests, among other things, that his name be restored to the Brigadier General Promotion List. Id. Currently before the Court is the Defendant's Motion to Dismiss, In Part, and for Summary Judgment [D.E. # 13] and the Plaintiff's Cross-Motion for Summary Judgment [D.E. # 17].[1] For the reasons discussed hereafter, the Court will grant the defendant's motion to dismiss and for summary judgment and deny the plaintiff's cross-motion for summary judgment.

---

[1] The following papers have also been submitted to the Court by the parties in connection to these motions: the defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, In Part, and For Summary Judgment ("Def.'s Mem."); the plaintiff's Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss, In Part, and for Summary Judgment ("Pl.'s Mem."); the defendant's Consolidated Memorandum in Opposition to Plaintiff's Cross Motion for Summary Judgment and Reply Memorandum in Support of Defendant's Motion to Dismiss, In Part, and for Summary Judgment ("Def.'s Reply"); and the Plaintiff's Reply to Defendant's Opposition to Plaintiff's Cross-Motion for Summary Judgment ("Pl.'s Reply").

## I. Factual Background

On October 31, 1987, the plaintiff accepted an appointment to become a member of the FLARNG. Defendant's Statement of Material Facts Which Are Not in Genuine Dispute. ("Def.'s SOF") ¶ 4.[2] After five years of service the plaintiff was promoted to the rank of Lieutenant Colonel and was then promoted to the rank of Colonel on March 6, 1996. Id. In March of 1999, the plaintiff was selected by the Adjutant General ("AG") of the Florida National Guard ("FNG") to assume command of a FNG Major Command and to serve simultaneously as the Deputy Commanding General of the 32nd Army Air and Missile Defense Command ("AAMDC"), an active duty Army Headquarters. Id. ¶ 5. On July 27, 2000, the Secretary of Defense announced that the plaintiff had been selected for promotion to the rank of Brigadier General and his name was submitted by the President of the United States to the Senate for confirmation on September 13, 2000. Id. ¶ 7.

On September 28, 2000, before action on the nomination was taken by the Senate, the DAIG received a memorandum from the FLARNG's Inspector General ("IG") referring a complaint that

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[2] The facts referenced primarily by the Court and found not to be genuinely in dispute are those asserted in the Defendant's Statement of Material Facts Which Are Not in Genuine Dispute and not challenged in the Plaintiff's Response to Defendant's Statement of Material Facts Which Are Not in Genuine Dispute ("Pl.'s Resp. to SOF"). Where agreement does not exist, the Court will so indicate. However, it appears that there are no material facts that are genuinely in dispute.

had been made pursuant to the Military Whistleblower Protection Act ("MWP Act"), 10 U.S.C. § 1034 (2000), accusing the plaintiff "of taking reprisal actions against a subordinate for making protected disclosures to his chain of command regarding [purported] criminal activities." Id. ¶ 8. Colonel Appleby was notified by telephone by the FNG AG on October 3, 2000, that he was being removed from the general officer promotion list at the request of the DAIG based on the whistleblower complaint that had been filed against him.[3] Id. ¶ 9. Thereafter, on October 6, 2000, Colonel Appleby was notified again by telephone by the Deputy IG of the DAIG that based on the complaint his name had been withheld by the Army from the list of officers whose promotions were confirmed by the Senate in October 2000. Id. ¶ 10. Colonel Appleby was subsequently advised on January 16, 2001, by the FNG AG, that the reprisal allegation could not be substantiated. Id. ¶ 11. However, he was informed that the whistleblower investigation had revealed other issues and that the authority of the Vice Chief of Staff ("VCSA") was needed for these newly discovered matters to be further investigated. Id. And, on January 31, 2000, the VCSA directed the DAIG to investigate the improprieties allegedly committed by senior officials assigned to the 32nd AAMDC of the FLARNG. Id. ¶ 12. The DAIG Report of Investigation ("ROI"), which was issued on June

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[3] The plaintiff states that he was informed that he was being "temporarily" removed from the general officer promotion list and that the Army, not the Secretary of Defense, requested that Congress withhold his nomination for promotion to the rank of Brigadier General pending completion of a DAIG investigation. Pl.'s Resp. to SOF ¶ 9.

28, 2001, and approved by the VCSA on the same day, concluded that the plaintiff had failed to ensure that a subordinate commander was properly relieved from a command position, that he had improperly prepared and processed a favorable annual officer evaluation report ("OER") of that subordinate commander, and that he had taken reprisals against junior officers for making protected communications. Id. ¶ 13. Shortly after the ROI was issued, the plaintiff authored an email sometime around July 13, 2001, which he forwarded to 35 individuals, informing them of his decision to voluntarily retire from the FLARNG, effective July 31, 2001. Id. ¶ 14; Compl. at 5 ¶ 37. The email further explained that after the IG investigation was satisfactorily completed, Colonel Appleby understood that he would be eligible to have his name resubmitted to the Senate for confirmation of his nomination to the rank of Brigadier General, but that he had chosen not to go through the process again.[4] On July 31, 2001, Colonel Appleby was transferred to retired status in the United States Army Reserve Control Group because he had fulfilled his maximum authorized years of service. Def.'s SOF ¶ 15.

On October 19, 2001, the VCSA issued a Memorandum of Concern ("MOC") to the plaintiff

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[4] The plaintiff agrees that he drafted and circulated the email regarding his retirement, but disagrees with any assertion that the information he related, which he received from Colonel Bruce Davis, is factually correct. Pl.'s Resp. to SOF ¶ 14. According to the plaintiff, Colonel Davis informed him that he would have to repeat the entire promotion selection process, which normally takes six to nine months to complete. Pl.'s Mem. at 5. Colonel Appleby asserts that this information was incorrect. Id.

indicating that he would not be officially reprimanded because the VCSA believed the plaintiff thought his actions it had investigated were in the best interest of his military unit. Id. ¶ 16. Nonetheless, the VCSA indicated that Colonel Appleby's actions did not meet the standards expected of a senior officer. Id. However, the MOC was not placed in the plaintiff's Official Military Personnel File and the matter was considered closed. Id.

On March 23, 2003, Colonel Appleby filed an application with the ABCMR requesting that the Board: (1) direct that he be promoted by operation of law to the rank of Brigadier General; (2) remove a Letter of Concern ("LOC") allegedly contained in his military personnel file; (3) award him all back pay, allowances, and benefits to which he is allegedly entitled; and (4) retire him at the rank of Brigadier General with all associated rights, benefits, and privileges or, alternatively, reinstate him to the FLANG at the rank of Brigadier General, along with crediting him with service at that rank from the date he otherwise would have been promoted to the date of his reinstatement. Id. ¶ 17; Compl. at 7 ¶ 51; Pl.'s Mem. at 6-7.

Before the ABCMR's decision was issued, the plaintiff was provided with an advisory opinion prepared by the National Guard Bureau General Officer Management Office. Pl.'s Mem. at 7 (citing Administrative Record ("Admin. R.") at 18-20). The advisory opinion concluded that the plaintiff's name had properly been withheld from the Brigadier General promotion list pursuant to Department of

Defense ("DOD") regulations. Admin. R. at 7. However, the advisory opinion went on to state that Colonel Appleby's nomination should be forwarded to the Senate for confirmation consideration, and that if he is confirmed, his records be corrected to reflect his promotion to the rank of Brigadier General as of October 6, 2000, with a subsequent retirement date of July 31, 2000. Id. On August 11, 2005, the ABCMR rendered its final decision unanimously denying the plaintiff's requested relief. Def.'s SOF ¶ 18. The decision was announced in a written "record of proceedings," which concluded that the plaintiff had failed to present "satisfactory evidence of error or injustice to warrant relief." Id. (citing Admin. R. at 16); see also id. ¶ 19 (citing Admin. R. at 2-16).

The plaintiff filed his nine count complaint in this Court on February 3, 2006. Counts I, II and III allege that the DAIG lacked legal authority and jurisdiction to investigate the Military Whistleblower Protection Act complaint. Compl. at 14-21. Counts IV, V, and VI allege violations of 10 U.S.C. § 14311(2000) and Army Regulation 600-8-29 for delaying Colonel Appleby's promotion. Id. at 21 28. Count VIII alleges a violation of the plaintiff's right to due process resulting from the failure to provide him with proper and timely notice and therefore an opportunity to respond to the adverse information used against him. Id. at 31. Finally, Count IX alleges that Colonel Appleby's retirement was involuntary and therefore unlawful. Id. at 33. The defendant has moved to dismiss Counts I, II, III, and VIII pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure or alternatively request summary judgment on all counts of the complaint. In

return, the plaintiff has filed a cross-motion for summary judgment on all counts of the complaint.

## II. Standard of Review

### A. Rule 12(b)(6) of the Federal Rules of Civil Procedure

To survive a motion to dismiss made pursuant to Rule 12(b)(6), a complaint need only provide "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957) (citing Fed. R. Civ. P. 8(a)). And, when reviewing such a motion, the court must accept as true all the factual allegations contained in the complaint. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993). A motion to dismiss under Rule 12(b)(6) tests not whether a plaintiff will ultimately prevail on the merits, but only whether the plaintiff has properly stated a claim for which he is entitled to relief. Woodruff v. DiMario, 197 F.R.D. 191, 193 (D.D.C. 2000). Thus, a complaint should not be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46. In deciding whether to dismiss a claim under Rule 12(b)(6), the Court can only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice. Equal Employment Opportunity

Comm'n v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624-25 (D.C. Cir. 1997).

### B. Rule 56 of the Federal Rules of Civil Procedure

This Court will grant a motion for summary judgment under Rule 56(c) if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, this Court must view the evidence in the light most favorable to the nonmoving party. Bayer v. United States Dep't of Treasury, 956 F.2d 330, 333 (D.C. Cir. 1992). However, the non-moving party cannot rely on "mere allegations or denials . . ., but . . . must set forth specific facts showing that there [are] genuine issue[s] for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (citation omitted). Under Rule 56, "if a party fails to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial," summary judgment is warranted. Hazward v. Runyon, 14 F. Supp. 2d 120, 122 (D.D.C. 1998) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). The party moving for summary judgment bears the burden of establishing the absence of evidence that supports the non-moving party's case. Id. In considering a motion for summary judgment, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility

determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

### C. The Administrative Procedure Act

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2) (2000), "[j]udicial review of the final decision of a military correction board is limited to a determination of whether the board's decision 'is arbitrary and capricious, contrary to law, or unsupported by substantial evidence.'" Roberts v. Harvey, 441 F. Supp. 2d 111, 118 (D.D.C. 2006) (quoting Frizelle v. Slater, 111 F.3d 172, 176 (D.C. Cir. 1997)); Calloway v. Brownlee, 366 F. Supp. 2d 43, 54 (D.D.C. 2005) (RBW). "[A] party seeking review of a board decision bears the burden of overcoming 'the strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully and in good faith.'" Roberts, 441 F. Supp. 2d at 118 (quoting Frizelle, 111 F.3d at 177). "As a general matter, the scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency." Id. (internal quotations and citation omitted). Accordingly, a court "will not disturb the decision of an agency that has 'examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" Id. (quoting MD Pharm. v. Drug Enforcement Admin., 133 F.3d 8, 16 (D.C. Cir. 1998) (citations omitted).

"The requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result." Dickson v. Sec'y of Def., 68 F.3d 1396, 1404 (D.C. Cir. 1995) (citing Public Citizen, Inc. v. FAA, 988 F.2d 186, 197 (D.C. Cir. 1993); Fed. Election Comm'n v. Rose, 806 F.2d 1081, 1088 (D.C. Cir. 1986)). The arbitrary and capricious standard of the APA "mandat[es] that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." Id. (citation omitted). "This does not mean that an agency's decision must be a model of analytic precision to survive a challenge. A reviewing court will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" Id. (citations omitted). However, the explanation provided by the agency must, at a minimum, contain "a rational connection between the facts found and the choice made." Id. (citation omitted).

As the District of Columbia Circuit has recognized, the final decisions of military correction boards are reviewed under "an unusually deferential application of the 'arbitrary and capricious' standard." Kreis v. Sec'y Air Force, 866 F.2d 1508, 1514 (D.C. Cir. 1989) (citations omitted); see also Roberts, 441 F. Supp. 2d at 119. "This high degree of deference arises from the statutory language authorizing a Secretary of a military department – acting through civilian boards – to correct military records 'when the Secretary considers it necessary to correct an error or remove an injustice.'" Roberts, id. (quoting 10 U.S.C. § 1552(a)(1)) (2000). In this regard, the Kreis court reasoned that:

> It is simply more difficult to say that the Secretary has acted arbitrarily if he is authorized to act 'when he considers it necessary to correct an error or remove an injustice,' 10 U.S.C. § 1552(a) (emphasis added), than it is if he is required to act whenever a court determines that certain objective conditions are met, i.e., that there has been an error or injustice.

Kreis, 866 F.2d at 1514. While only the "most egregious" Board decisions will fail this deferential standard of review, a plaintiff can establish that the Board's decision-making process was flawed and in violation of the APA by showing that the Board did not consider or respond to an argument that did not appear to be "frivolous" on its face and could affect the Board's ultimate disposition." Roberts 441 F. Supp. 2d at 119 (quoting Frizelle, 111 F.3d at 177); see also Calloway, 366 F. Supp. 2d at 54.

## III. Legal Analysis

### A. The Defendant's Motion to Dismiss

The defendant moves to dismiss Counts I, II, III and VIII of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state claims upon which relief can be granted. For the reasons set forth below the motion is granted.

Count I of the complaint alleges that the DAIG lacked legal authority to investigate the MWP Act complaint filed against the plaintiff. Compl. at

16 ¶ 120. The theory underlying the claim is the plaintiff's position that "[m]embers of the FLARNG are not 'members of the armed services' for purposes of the Military Whistleblower Protection Act except under certain circumstances," which are not applicable in this case. Id. at 14 ¶ 110. In response, the defendant contends that Count I is based upon an erroneous reading of the MWP Act. Def.'s Mem. at 6. Although the plaintiff raises these allegations in Count I of his complaint, it appears that he has conceded the matter because he has not responded to the defendant's argument in his opposition or raised the viability of this claim again in his cross motion for summary judgment.

"It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." Hopkins v. Women's Div., General Bd. of Global Ministries, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) (RBW) (citing FDIC v. Bender, 127 F.3d 58, 67-68 (D.C. Cir. 1997); see also Day v. D.C. Dep't of Consumer & Regulatory Affairs, 191 F. Supp. 2d 154, 159 (D.D.C. 2002) ("If a party fails to counter an argument that the opposing party makes in a motion, the court may treat that argument as conceded."). Notwithstanding the plaintiff's silence on this issue in his responsive pleading, the Court notes that as a matter of law, the MWP Act does apply to members af a State National Guard because "all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States," which is a

component of the United States Army. Perpich v. Dep't of Defense, 496 U.S. 334, 345 (1990). Pursuant to 10 U.S.C. § 101(c)(3) (2000), the Army National Guard of the United States is defined as "the reserve component of the Army all of whose members are members of the Army National Guard." And, because the Army National Guard of the United States is a component of the Army, it falls under the definition of armed forces for the purposes of the MWP Act. The DAIG therefore had legal authority to investigate the alleged violation made against the plaintiff under this Act. Accordingly, Count I of the complaint is dismissed for failure to state a claim upon which relief can be granted.

Counts II and III of the complaint allege that the DAIG lacked jurisdiction to entertain the whistleblower complaint. Compl. at 16. Specifically, Count II alleges that the DAIG did not have jurisdiction over the complaint lodged against Colonel Appleby because it was not filed within sixty days of the alleged incident. Id. at 17; Pl.'s Mem. at 27. Thus, argues the plaintiff, the IG was precluded from investigating the allegation pursuant to 10 U.S.C. § 1034(c)(4) and Army Regulation 20-1. Id. 10 U.S.C. § 1034(c)(4) provides that "[n]either an initial determination under paragraph (3)(A) nor an investigation under paragraph (3)(D) is required in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation." Additionally, Army Regulation 20-1, Chapter 6-6(i) states:

> [T]he IG, DOD is required to investigate allegations of individuals taking (or threatening to take) unfavorable personnel actions or withholding (or threatening to withhold) favorable personnel actions as reprisal against a member of the Armed Forces for communicating with an MC [Member of Congress] or a member of an audit, inspection, investigation or law enforcement organization withing DOD. . . . [W]hen such complaints are made within 60 days of learning of the reprisal, [the] military whistleblower legislation applies.

Id. (quoting Army Regulation 20-1, Chapter 6-6(i)). The plaintiff urges this Court to interpret the statute in conjunction with Army Regulation 20-1 to mean that if a complaint is not brought within 60 days of the alleged act of reprisal, the IG is precluded from investigating the purported violation. Pl.'s Mem. at 27. In its evaluation of this argument, the ABCMR concluded that "[w]hile applicable laws and regulations indicate that a whistleblower complaint should be received within 60 days of discovery, it does not preclude the Department from considering or investigating complaints after 60 days." Admin. R. at 14 ¶ 2. The ABCMR further reasoned that:

> the Army had a Federal interest in the applicant not only due to his status as an officer but also in regards to Federal Recognition and his position as the deputy commander of a one-of-a-kind unit that is also an active Army unit with a contingency/deployment mission. Accordingly, the IG had a responsibility to investigate any matters it deemed appropriate to the events at hand (regardless of the outcome) if authorization from the appropriate authority was obtained beforehand. Such authorization was obtained from the VCSA in accordance with the applicable regulations and there appears to be no violations of the applicant's rights in this matter.

Id. at 12 ¶ 4. While the plaintiff contends that the ABCMR's decision on this issue was arbitrary, capricious, not supported by substantial evidence, and contrary to law, Pl.'s Mem. at 29, the record clearly shows that the ABCMR's assessment of this issue "adequately explains its result," Dickson, 68 F.3d at 1404, and clearly establishes that the ABCMR "examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice [made]." Roberts, 441 F. Supp. 2d 188.

A whistleblower complaint having been filed against the plaintiff required that an investigation be undertaken, during which other alleged indiscretions were uncovered. Although the Army regulations at issue mandate an investigation if a complaint is made within 60 days, the ABCMR is certainly not precluded from investigating complaints received after 60 days. Moreover, as the ABCMR stated, the Army had a clear Federal interest to investigate the transgressions against the plaintiff, not only because he was being considered for a promotion to the rank of Brigadier General, but also because he held the position as deputy commander of an active special unit that could be deployed at any time. Thus, this Court "will not disturb the decision of [the ABCMR; which] examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" Id. (citing MD Pharm., 133 F.3d at 16). Accordingly, Count II of the complaint is dismissed for failure to state a claim for which relief can be granted and summary judgment on the plaintiff's cross-motion is denied on this Count of the complaint.

The above legal conclusion is equally applicable with respect to Count III of the complaint, wherein the plaintiff alleges that the IG's consideration of the whistleblower complaint was improper because the complainant failed to exhaust his available administrative remedies. Pl.'s Mem. at 29. As support for this position, the plaintiff relies on Army Regulation 20-1, which provides:

> [T]here are many situations for which law or regulation provide soldiers a remedy or means of redress. Soldiers must seek the remedy or redress before an IG can provide assistance. Once the soldier has used the available redress procedures, IG assistance is limited to a review of the situation to determine if the soldier was afforded due process provided by law or regulation.

Id. (citing Army Regulation 20-1). The plaintiff further alleges that the ABCMR did not address his position on this point in its "Discussion and Conclusions." Compl. at 21 ¶ 166. The defendant agrees that the plaintiff correctly quotes Army Regulation 20-1, but points out that whistleblower complaints are addressed in a separate section of the regulation because "they are a unique type of allegation subject to unique consideration and treatment." Def.'s Reply at 12. Moreover, the defendant contends that the plaintiff's reading of Army Regulation 20-1 would undermine one purpose of the whistleblower provisions – to provide a quick resolution to such complaints. Id. at 13.

As for the plaintiff's allegation that the lack of exhaustion claim was not addressed by the ABCMR, this argument is simply incorrect. In fact, the ABCMR noted that the exhaustion claim had been raised by the plaintiff, Admin. R. at 4, and that the plaintiff continued to "contest the lawfulness of the investigation." Id. at 8. In any event, as explained by the ABCMR in the Administrative Record:

> The Army had a Federal interest in the [plaintiff] not only due to his status as an officer but also in regards to Federal Recognition and his position as the deputy commander of a one-of-a-kind unit that is also an active Army unit with a contingency/deployment mission.

Admin. R. at 14 ¶ 4. As such,

> the IG had a responsibility to investigate any matters it deemed appropriate to the events at hand (regardless of the outcome) if authorization from the appropriate authority was obtained from the VCSA in accordance with the applicable regulations and there appears to be no violation of the [plaintiff's] rights in that matter.

Id. While the ABCMR did not explicitly state that the argument at hand was being addressed, it is nonetheless patently clear from the above statements that it did "examine[] the relevant data" concerning the plaintiff's claims and has "articulated a satisfactory explanation for its action." Calloway, 366 F. Supp. 2d at 53 (internal quotation marks and citations omitted). Thus, the conclusion reached by the ABCMR was not arbitrary, capricious, contrary to law, or unsupported by substantial evidence. Moreover, the Court also seriously questions the applicability of the exhaustion requirement to the situation here. Exhaustion requirements are imposed to afford agencies the initial opportunity to

address the concerns of an alleged aggrieved party. And that party here would be the whistleblower, not the plaintiff. Thus, even if the plaintiff is correct that the ABCMR failed to address his exhaustion challenge, the omission would be of no moment. Accordingly, Count III is dismissed for failure to state a claim upon which relief can be granted and summary judgment is denied on this claim with respect to the plaintiff's cross-motion for summary judgment.

Count VIII of the complaint alleges that the plaintiff's right to due process was violated because "he was never informed by the DAIG, orally or in writing, of the specifics of the allegations against him at any time during the investigation." Compl. at 31 ¶ 250. As support for this position, the plaintiff relies on Army Regulation 20-1, paragraph 7-6, which states that "[i]f an individual was not informed of the unfavorable information during the IG investigation, the IG will advise the person concerned, orally or in writing, of its substance before the IG investigation is completed." Id. at 31 ¶¶ 248-49 (citing Army Regulation 20-1, dated March 29, 2002).[5] The plaintiff also contends that when he first learned of the allegations against him on March 14, 2001, it was in a "cursory" manner. Id. at 31-32 ¶¶ 251-52. And, although Colonel Appleby was interviewed and questioned thereafter in great

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[5] The parties have not provided the Court with the 2002 version of Army Regulation 20-1, paragraph 7-6. However, the defendant does not challenge the wording of the regulation as indicated by the plaintiff, but rather takes exception to the plaintiff's interpretation of it. Def.'s Mem. at 13.

detail on two occasions during the investigation, he contends that "[a]t no time during the two interviews did the DAIG apprise [him] of the specific allegations that formed the basis of the allegations against him. Id. at 32 ¶¶ 254-56. The defendant, on the other hand, alleges that Count VIII of the complaint fails to state a claim upon which relief can be granted because it is based on an erroneous interpretation of Army Regulation 20-1. Def.'s Mem. at 13. For the following reasons, the defendant's motion to dismiss Count VIII of the complaint is denied and the claim is remanded to the Secretary for a determination of whether the plaintiff was afforded adequate notice of the charges that had been made against him.

There is no question that the plaintiff was advised of the charges against him. However, he maintains that the notice he received did not provide any details of the particular actions forming the bases of the allegations. Specifically, he acknowledges that on March 14, 2001, during an interview conducted by an investigator, he was informed that he was "suspected of the following allegations which [they] want[ed] to question [him] about: That [he] improperly relieved an officer; that [he] improperly processed Officer Evaluation Reports; and, that [he] reprised against an Officer for making a protected communication. Compl. at 31-32 ¶¶ 251-252. Additionally, on May 21, 2001, the plaintiff was again informed during the course of the investigation "of the allegations against him in the same manner as he [was] during the March 14, 2001 interview." Id. at 32 ¶¶ 254-255; see also Admin. R. at 153 (acknowledging that the plaintiff was notified as early as March 14, 2001, of the specific allegations

against him). Thus, as the record indicates, the plaintiff was advised, prior to the completion of the investigation on June 29, 2001, of the allegations against him.[6] Nonetheless, he insists that "[t]he DAIG did not provide any details of the particular actions forming the bases of the allegations against [him]." Compl. at 32 ¶ 256.

"The requirement that agency action not be arbitrary and capricious includes a requirement that the agency adequately explain its result." Dickson, 68 F.3d at 1404 (citing Public Citizen, Inc., 988 F.2d at 197; Fed. Election Comm'n, 806 F.2d at 1088) Thus, the arbitrary and capricious standard of the APA "mandat[es] that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at

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[6] In Count VIII of the complaint, Colonel Appleby 6 claims that he was denied his procedural right of notice and response because the DAIG never informed him orally or in writing, of the specifics of the allegations against him at any time during the investigation. Compl. at 31 ¶¶ 250-251. He seems to suggest that he was entitled to notice and an opportunity to respond in writing prior to being removed from the promotion list. Id. Colonel Appleby's assessment is illogical, however, because the investigation that he is referring to in Count VIII is a subsequent investigation that was triggered as a result of the initial whistleblower complaint filed against him. In other words, as a result of the whistleblower complaint, other issues were uncovered that required further investigation. Thus, at the time the plaintiff was removed from the promotion list, the investigation of the charges alleged in Count VIII had not yet commenced. And, the regulation that Colonel Appleby relies upon to support his contention, specifically provides that "[t]he individual has the right to know of the unfavorable information during the IG inquiry or investigation." Id. at 31 ¶ 248 (citing Army Regulation 20-1 at 7-6).

the time of decision." Id. (citation omitted). Here, based on the record before it, the Court questions whether the plaintiff was provided adequate notice of the allegations against him. The Court has this reservation despite the fact that the plaintiff was extensively interviewed on two occasions – March 14, 2001, and May 21, 2001 – after the allegations that are the subject of Count VIII came to light. According to the plaintiff, a 78-page type-written report was produced from the March interview and an additional 91 page type-written report was produced as a result of the May interview. Compl. at 31-32 ¶¶ 251-54. Yet, the defendant did not include these reports in the administrative record, nor did the defendant address the plaintiff's inadequate notice argument. Thus, it is difficult for this Court to discern whether the plaintiff was adequately advised of the allegations against him.

The District of Columbia Circuit has concluded that the failure of a ABCMR to respond to arguments raised by a plaintiff, "which do not appear frivolous on their face and could affect the Board's ultimate disposition, . . . [is] arbitrary." Frizelle, 111 F.3d at 177; see also Mudd v. Caldera, 26 F. Supp. 2d 113, 123 (D.D.C. 1998). Accordingly, because it appears the plaintiff raised his inadequacy notice argument with the ABCMR, and the argument is not frivolous on its face, the Court must conclude that the ABCMR's failure to address it was arbitrary and this case must be remanded to the Secretary of the Army to address this argument. Therefore, the defendant's motion to dismiss Count VIII of the complaint is denied without prejudice.

### B. The Parties' Cross-Motions for Summary Judgment

Both parties move for summary judgment on the remaining counts of the plaintiff's complaint – Counts IV, V, VI, VII and IX. Def.'s Mem. at 14-20; Pl.'s Mem. at 1. Counts IV, V and VI of the complaint all allege violations of 10 U.S.C. § 14311 (2000) and Army Regulation 600-8-29 for delaying Colonel Appleby's promotion (Count IV), failing to notify him in writing of the Army's decision to delay his promotion and provide him an opportunity to respond in writing to the Secretary of the Army (Count V), and by failing to obtain Secretary of the Army approval to delay Colonel Appleby's promotion beyond the authorized six month period (Count VI). Compl. at 21, 25 & 27. 10 U.S.C. § 14311(a) provides:

> (a) Delay during investigations and proceedings.--(1) Under regulations prescribed by the Secretary of Defense, the appointment of an officer to a higher grade may be delayed if any of the following applies before the date on which the appointment would otherwise be made:
>
> (A) Sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and the charges have not been disposed of.

> (B) An investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer.
>
> (C) A board of officers has been convened under section 14903 of this title to review the record of the officer.

With respect to the plaintiff's allegation of delay, Army Regulation 600-8-29 at 1-19(a)(4) states that "[a]n officer's promotion is automatically delayed . . . when the officer is – [u]nder investigation that may result in disciplinary action of any kind being taken against him or her.

In Count IV of the compliant the plaintiff contends that he was not "officially" under investigation when he was advised that a whistleblower complaint had been filed against him and consequently removed from the list of officers to be submitted to the Senate for confirmation to Brigadier General because the action taken against him does not qualify as an investigation as defined in 10 U.S.C. § 14311. Pl.'s Mem. at 21; Compl. at 22 ¶¶ 174-76. Thus, the plaintiff contends that there was no basis for delaying his promotion under 10 U.S.C. § 14311. Pl.'s Mem. at 20; Compl. at 24 ¶ 190. He urges the Court to believe that the investigation against him did not formally begin until the VCSA issued a directive that the DAIG investigate alleged improprieties by senior officials assigned to the 32nd AAMDC of the FLARNG. Pl.'s Mem. at 20-21; Compl. at 24 ¶¶ 186-189. In other words, the plaintiff contends that the events occurring between

the filing of the whistleblower complaint and the issuance of the VCSA directive to the DAIG was not an investigation within the terms of § 14311. Rather, he asserts, the "real" investigation only began after the VCSA issued its directive with respect to the improprieties uncovered during the whistleblower probe. The Court cannot agree with the plaintiff's assessment.

The plaintiff clearly became the subject of an investigation when the whistleblower complaint was received. As the defendant notes, the plaintiff was under investigation pursuant to DOD Instructions ("DODI") 1320.4 before the Senate had an opportunity to confirm his nomination because the Secretary of Defense had requested that the Senate defer consideration of the plaintiff's promotion "'until the investigation [was] complete . . . and a determination of suitability' was made." Admin. R. at 31; Def.'s Reply at 8.[7] Moreover, the ABCMR addressed the plaintiff's argument on this point and concluded that "[t]he applicant's contention that his promotion was unjustly and illegally withheld from

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[7] DODI 1320.4 at ¶ 6.2.1.7 states:

In those cases where the officer(s) identified with adverse or alleged adverse information is on a promotion list as outlined in subparagraph 6.2.1.6., above, the ASD(FMP), with the verbal concurrence of the Director, WHMO, and the Executive Secretary of the Department of Defense shall advise the SASC, and ask it to defer nomination of the officer(s) concerned while permitting the remaining officers on the list to continue forward for confirmation. The ASD(FMP) shall provide the Secretary of Defense copies of the memorandum sent to the Director, WHMO and letter sent to the Chairman, SASC advising of the requests made under this subparagraph. The ASD(FMP) shall also advise the Chairman of the Joint Chiefs of Staff.

Senate confirmation has been noted and found to be without merit." Admin. R. at 161. The ABCMR further stated:

> Although the complaint that was received at the time the applicant was scheduled for Senate confirmation for promotion to the rank of BG was subsequently determined unfounded for reprisal, the investigation uncovered additional information that would be expected to be made available for Senate confirmation, regardless of how serious or unimportant the applicant may deem it. Accordingly, his name was properly withdrawn until such time as the investigation was finalized.

Id. at 162 (emphasis added). The Administrative Record therefore clearly shows that the plaintiff was under investigation the moment the whistleblower complaint was filed against him. Once again, this Court must conclude that the ABCMR "examined the relevant data" concerning the plaintiff's claims and "articulated a satisfactory explanation for its action." Calloway, 366 F. Supp. 2d at 53 (internal quotation marks and citations omitted). And the conclusion reached by the ABCMR was not arbitrary, capricious, contrary to law, or unsupported by substantial evidence. Accordingly, summary judgment is granted to the defendant with respect to Count IV of the complaint and the plaintiff's cross-motion for summary judgment on this Count is denied.

In Count V of the complaint the plaintiff also contends that the Army violated 10 U.S.C. § 14311 and Army Regulation 600-8-29, but as to this count, he alleges that the violation resulted from the Army's failure to notify him in writing of its decision to delay his promotion and provide him an opportunity to respond in writing to the Secretary of the Army regarding this decision. Compl. at 25 ¶ 199; Pl.'s Mem. at 16. He posits that the ABCMR's decision on this issue was contrary to law, arbitrary, capricious, and unsupported by substantial evidence. Id.

10 U.S.C. § 14311(c) provides:

> (c) Notice to officer. – (1) The appointment of an officer to a higher grade may not be delayed under subsection (a) or (b) unless the officer is given written notice of the grounds for the delay. The preceding sentence does not apply if it is impracticable to give the officer written notice before the date on which the appointment to the higher grade would otherwise take effect, but in such a case the written notice shall be given as soon as practicable.
>
> **(2)** An officer whose promotion is delayed under subsection (a) or (b) shall be given an opportunity to make a written statement to the Secretary of the military department concerned in response to the action taken. The

> Secretary shall give consideration to any such statement.

(emphasis added). As previously noted above, the plaintiff acknowledged that he was notified of the decision to withdraw his name from consideration by the Senate because a complaint had been filed against him. See Pl.'s Resp. to SOF ¶¶ 9-10. Specifically, the plaintiff was notified by telephone that he was being removed from the Brigadier General promotion list because a complaint had been filed accusing him of taking reprisal actions against a subordinate for making protected disclosures to his chain of command regarding alleged criminal activities. Id. ¶¶ 8-9 (citing Admin. R. at 8 ¶¶ 7-9). Consequently, the plaintiff was afforded the opportunity to provide a written response to the Secretary of the Army. And as the ABCMR noted, "[w]hile lack of written notification is not condoned, there is no evidence submitted by the applicant with his application to support [the contention that he was not advised of the action being taken] or evidence of harm that resulted from his telephonic notification [rather than] written notification." Admin. R. at 162 ¶ 5. Moreover, it is clear from the Administrative record that the plaintiff's claim of not being provided written notification was considered. Id. Although the ABCMR did not specifically address the plaintiff's contention that he was not provided the opportunity to respond in writing to the Secretary, it is reasonable to infer that once the plaintiff was notified of the charges against him, he had the opportunity to respond in writing "in response to the action taken." 10 U.S.C. § 14311(c). This conclusion is evidenced by a letter the plaintiff

sent to the Chief of Staff of the FLARNG stating that he understood that after receiving a report of the investigation from the Judge Advocate General he had 30 days to respond. Compl. at 5 ¶ 37. Moreover, Colonel Appleby demanded his right to the assistance of "experienced and competent legal representation to assist in that response." Id. And, Colonel Appleby did receive what he characterizes as a "highly redacted" copy of the ROI 21 days after what he contends was his involuntary retirement. Compl. at 6 ¶ 42. Thus, the plaintiff was aware and was taking full advantage of his right to present his position in response to the allegations against him.

The arbitrary and capricious standard of the APA "mandat[es] that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." Dickson, 68 F.3d at 1404 (citation omitted). "This does not mean that an agency's decision must be a model of analytic precision to survive a challenge. A reviewing court will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" Id. Because "the scope of review under the arbitrary and capricious standard is narrow [this] Court [will] not substitute its judgment for that of the [ABCMR]." Roberts, 441 F. Supp. 2d at 118. Accordingly, summary judgment is granted on Count V in favor of the defendant and denied as to the plaintiff.

Count VI of the complaint alleges again that the Army violated 10 U.S.C. § 14311 and Army Regulation 600-8-29 by failing to obtain approval from the Secretary of the Army to delay Colonel

Appleby's promotion beyond the six month period authorized by the statute and regulations. Compl. at 27 ¶ 216. 10 U.S.C. § 14311(d) provides, in pertinent part:

> (d) Maximum length of delay in promotion. – The appointment of an officer to a higher grade may not be delayed under subsection (a) or (b) for more than six months after the date on which the officer would otherwise have been promoted unless the Secretary concerned specifies a further period of delay.

And, Army Regulation 600-8-29 at 1-20(b) provides, in pertinent part, that "[a]n officer's promotion will not be delayed more than six months unless the [Secretary of the Army] or the Secretary's designee grants a further delay." The fact that the plaintiff's promotion was delayed beyond the six month period was specifically addressed by the ABCMR. As the ABCMR noted, an advisory opinion issued by the General Officer Management Office indicated that the Secretary of Defense had requested that "Congress withhold the plaintiff's nomination until the investigation was complete and a determination of suitability was made, which effectively authorized

a promotion delay past a six-month period." Def.'s Mem. (citing Admin. R. at 158).[8]
The advisory opinion specifically stated:

> On September 13, 2000, COL Appleby's nomination for Federal recognition to the grade of Brigadier General was received in the Senate. On September 29, 2000, the Department of the Army Inspector General received an adverse allegation ascribed to COL Appleby. On October 3, 2000, the Army notified the Secretary of Defense, as required by DODI 1320.4, paragraph 6.2.1.7, and the Secretary of Defense subsequently requested that Congress withhold COL Appleby's nomination until the investigation was complete. Accordingly, COL Appleby's nomination was appropriately withheld.

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[8] The defendant also contends that the plaintiff's argument with respect to Count VI is based upon an erroneous reading of 10 U.S.C. § 14311. Def.'s Mem. at 9. The plaintiff alleges that the Secretary of the Army failed to authorize an additional delay beyond the initial 6-month period authorized by 10 U.S.C. § 14311. Compl. at 27 ¶ 216. However, the period of delay is not determined by the Secretary of the Army, but rather it is the Secretary of Defense who can request that the Senate delay a promotion. Def.'s Mem. at 9. Accordingly, it was the Secretary of Defense who requested that the Senate delay consideration of the plaintiff's nomination. Def.'s Mem. at 9 (citing Admin. R. at 31). Thus, the plaintiff's interpretation that the Secretary of the Army has authority to authorize a delay beyond the 6-month period is an incorrect reading of the statute.

Admin. R. at 31. Thus, as the ABCMR found, the "Secretary concerned specifie[d] a further period of delay." 10 U.S.C. § 14311(d). This Court must therefore conclude that the ABCMR "examined the relevant data and articulated a satisfactory explanation for its action." Calloway, 366 F. Supp. 2d at 53 (internal quotation marks and citations omitted). Accordingly, the ABCMR's finding that the delay of Colonel Appleby's promotion was properly authorized beyond § 14311(d)'s six month period was not was not arbitrary nor capricious. Summary judgment is therefore granted to the defendant on Count VI of the complaint and the plaintiff's demand for summary judgment on this Count is denied.

Count VII of the plaintiff's complaint alleges that the DAIG erroneously concluded that the LOCs issued by Colonel Appleby against two subordinate officers for substandard leadership and management were "Letters of Reprimand" and amounted to threats against the officers for making protected communications. Compl. at 28-29 ¶ 232-234.

During Colonel Appleby's command as the Deputy Commanding General of the 32nd AAMDC, Colonel Appleby conducted an investigation that allegedly raised serious issues about the leadership and integrity of key battalion officers, a Major and a Lieutenant. Compl. at 8 ¶ 61. Colonel Appleby concluded that both officers should be counseled regarding their conduct and the matters were addressed in two LOCs. Id. at 11 ¶ 89. Colonel Appleby contends that because he directed that the LOCs not be placed in the officers personnel files, the LOCs did not amount to adverse actions against

the officers. Pl.'s Mem. at 33. Accordingly, he contends that the DAIG's conclusion that he issued the letters of reprimand as threats against the two subordinate officers were erroneous and therefore improperly served as a basis for his "non-promotion to Brigadier General and his eventual retirement from the FLARNG." Id. at 31.

On the other hand, the defendant opines that "the [p]laintiff is limited to challenging the ABCMR's decision in this Court and cannot attack the underlying decision that he asked [the Board] to review." Def.'s Reply at 13. Presumably, the defendant is referring to the wealth of case law "entrusting the primary duty of the correc[tion] of military records with the military corrections boards." See Harris v. United States, 14 Cl. Ct. 84, 89 (Cl. Ct. 1987); see also Sanders v. United States, 594 F.2d 804, 813-814 (Cl. Ct. 1979). Indeed, judicial review is limited to determining whether there has been substantial compliance with applicable statutes and regulations, whether the agency acted arbitrarily and capriciously, and whether there is substantial evidence to support the agency's decision. Wolfe v. Marsh, 835 F.2d 354, 358 (D.C. Cir. 1987); Dilley v Alexander, 603 F.2d 914, 919-20 (D.C. Cir. 1979). However, "the arbitrary and capricious standard of the APA "mandat[es] that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." Dickson, 68 F.3d at 1404. Here, the defendant points out that the DAIG concluded that the letters the plaintiff issued to the two junior officers could be considered adverse actions prohibited by

whistleblower protections based on the content of the letters. Def.'s Reply at 13. And, "[w]hether or not a letter is considered a letter of reprimand does not hinge on whether the letter is filed in a soldier's OMPF (official file) or MPRJ (local file)." Def.'s Reply at 13 (citing AR 600-37, ¶ 3-4.) Moreover, the FNG AG concluded that the letter to Major Hulen was an "informal letter of reprimand." Id. The defendant also points out that "most importantly, the plaintiff himself characterized the letter to MAJ Hulen as a letter of reprimand at least twice." Id. (citation omitted). The ABCMR briefly addressed this issue, stating that "[a]lthough the applicant does not agree with the findings of the IG, [see Admin. R. at 6 ¶ 7,] there were substantiated findings that would have required another look by a [Promotion Review Board] process to determine if his name should be resubmitted for confirmation by the Senate." Admin. R. at 15. Moreover, the defendant opines that "[e]ven if the DAIG's conclusions were wrong regarding the nature of the letters the plaintiff issued to his subordinates, which the defendant does not concede, there were still substantiated allegations against the

plaintiff that would require review under DODI 1320.4 ¶ 6.2.1.8."[9] Thus, the defendant posits that "the Secretary of the [A]rmy would have had to make

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[9] DODI 1320.4 ¶ 6.2.1.8 states:

> When an investigation or inquiry is completed on an officer(s) whose nomination is on hold at the SASC under subparagraph 6.2.1.6., above, the Secretary of the Military Department concerned shall so inform the Secretary of Defense, through the ASD(FMP), in writing. The Secretary of the Military Department's notification shall state if the allegations were substantiated, what action was taken, if any, and whether or not the Secretary of the Military Department still supports the nomination. In those cases where the allegation is substantiated and the Secretary of the Military Department and the Secretary of Defense support the nomination, that nomination shall be processed for approval to the President. If the President continues to support the nomination, the ASD(FMP) shall advise the SASC to proceed with the confirmation process. If, based on the adverse information, the Secretary of the Military Department does not support the nomination, the Secretary of the Military Department concerned shall submit a new nomination package to the Secretary of Defense, through the ASD(FMP), requesting that the President withdraw the nomination from the SASC. In those instances where the allegation is unsubstantiated, the ASD(FMP), with the verbal concurrence of the Director, WHMO, and the Executive Secretary of the Department of Defense shall advise the SASC of the outcome of the investigation or inquiry and request that the nomination proceed forward for confirmation. The ASD(FMP) shall provide the Secretary of Defense copies of the memorandum sent to the Director, WHMO and the letter sent to the SASC advising of the action taken. The ASD(FMP) shall also advise the Chairman of the Joint Chiefs of Staff.

a determination whether to continue to support the plaintiff's nomination...." Def.'s Reply at 14.

The Court agrees with the defendant and therefore cannot find that the ABCMR's conclusion with respect to the context of the letters was arbitrary and capricious, contrary to law, or unsupported by substantial evidence. Kreis, 866 F.2d at 1514. Moreover, the defendant aptly notes that even if the conclusion about the letters was incorrect, there were other substantiated findings made against the plaintiff that he does not challenge, namely, that he failed to ensure that a subordinate commander was properly relieved from a command position and that he had improperly prepared and processed an annual OER. Def.'s Reply at 14; Def.'s SOF at 13. Thus, the plaintiff's position that the LOCs were improperly used "as the basis for his non-promotion to Brigadier General and his eventual retirement from the FLARNG," even if correct, would not entitle him to the requested relief, as the other substantiated allegations made against him plaintiff would have required review under DODI 1320.4 ¶ 6.2.1.8. Accordingly, summary judgment is awarded to the defendant on Count VII of the complaint and the plaintiff's cross-motion for summary judgment on this count is denied.

Finally, Count IX of the complaint alleges that Colonel Appleby's involuntary retirement was unlawful. Colonel Appleby bases this claim on the assumption that he was never in a non-promotable status and thus "his removal from the Brigadier General Promotion List was unlawful," rendering "his subsequent involuntary retirement [also]

unlawful." Compl. at 33 ¶¶ 267-68. Because the Court has already concluded that the ABCMR's decision upholding Colonel Appleby's removal from the promotion list was not arbitrary and capricious, contrary to law, or unsupported by the evidence, the allegation in Count IX is now moot. As the ABCMR found, because Colonel Appleby had reached his maximum years of service for an Active Reserve Colonel, he was transferred to Retired Reserve status. Def.'s Mem. at 19 (citing Admin. R. at 162); see 10 U.S.C. § 14507 (2000) (requiring that Reserve Colonels with 30 years of service be retired unless they are on a list of officers recommended for promotion to the next higher grade). And, at the time of his retirement, Colonel Appleby was not on the Brigadier General promotion list. Commenting on this situation, the ABCMR stated:

> While it [was] unfortunate that the applicant reached his maximum years of service before he could be reconsidered for promotion, the evidence does not suggest that there was any conspiracy or specific effort to deny him an opportunity to be reconsidered for promotion. The clock simply ran out on him as it does many officers in similar circumstances.

Admin. R. at 163. The Court cannot take exception to this observation, and accordingly, the defendant is entitled to summary judgment on Count IX of the complaint and summary judgment for the plaintiff on this count is denied.

## IV. Conclusion

For the foregoing reasons, the defendant's motion to dismiss with respect to Count I, II and III is granted and Count VIII is denied. The defendant's motion for summary judgment with respect to the remaining counts of the complaint, Counts IV, V, VI, VII, and IX, is granted. On the other hand, the plaintiff's cross-motion for summary judgment is denied with respect to Counts I through VII and IX and granted as to Count VIII.

SO ORDERED on this 29th day of May, 2007.[10]

REGGIE B. WALTON
United States District Judge

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[10] An Amended Order is being issued with this Memorandum Opinion. The Order issued on March 30, 2007 is hereby vacated.

**DEPARTMENT OF THE ARMY**
**BOARD FOR CORRECTION OF MILITARY RECORDS**
**1901 SOUTH BELL STREET 2ND FLOOR**
**ARLINGTON, VA 22202-4508**

August 16, 2005

AR2004105941, APPLEBY, CHARLES C.

COL (RET) CHARLES C APPLEBY
2658 SIMS COVE LANE
JACKSONVILLE, FL 32223

Dear Colonel Appleby:

I regret to inform you that the Army Board for Correction of Military Records denied your application.

The Board considered your application under procedures established by the Secretary of the Army. I enclose a copy of the Board's Record of Proceedings. This decision explains the Board's reasons for denying your application.

This decision in your case is final. You may request reconsideration of this decision within one year only if you can present new evidence or argument that was not considered by the Board when it denied your original application.

Sincerely,

/s/
Carl W. S. Chun
Director, Army Board for Correction
of Military Records

Enclosure

**DEPARTMENT OF THE ARMY**
**BOARD FOR CORRECTION OF MILITARY RECORDS**
**1901 SOUTH BELL STREET 2ND FLOOR**
**ARLINGTON, VA 22202-4508**

SFMR-RBR August 16, 2005

MEMORANDUM FOR CHIEF, NATIONAL GUARD BUREAU, GENERAL OFFICER MANAGEMENT OFFICE (NGB-GOMO) 1411 JEFFERSON DAVIS HIGHWAY, ARLINGTON, VA 22202-3231

SUBJECT: Army Board for Correction of Military Records Record of Proceedings for COLONEL (Retired) APPLEBY, CHARLES C., SSN 267764826, AR2004105941

The application submitted by the individual concerned has been denied by the Army Board for Correction of Military Records.

/s/
Carl W. S. Chun
Director, Army Board for Correction of Military Records

Encl

CF:
(1) OMPF
(1) APPLICANT

**DEPARTMENT OF THE ARMY**
**BOARD FOR CORRECTION OF MILITARY RECORDS**
**1901 SOUTH BELL STREET 2ND FLOOR**
**ARLINGTON, VA 22202-4508**

RECORD OF PROCEEDINGS

IN THE CASE OF: APPLEBY, CHARLES C.

BOARD DATE: 11 AUGUST 2005
DOCKET NUMBER: AR2004105941

I certify that hereinafter is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in the case of the above-named individual.

| | |
|---|---|
| Mr. Carl W. S. Chun | Director |
| Mr. Jessie B. Strickland | Analyst |

The following members, a quorum, were present:

| | |
|---|---|
| Mr. John Slone | Chairperson |
| Ms. Deborah Jacobs | Member |
| Mr. Michael Flynn | Member |

The Board considered the following evidence:

Exhibit A - Application for correction of military records.

Exhibit B - Military Personnel Records (including advisory opinion, if any).

THE APPLICANT'S REQUEST, STATEMENT, AND EVIDENCE:

1. The applicant requests that he be promoted to the rank of brigadier general (BG) by operation of law, that a letter of concern (LOC) be removed from his Official Military Personnel File (OMPF), that he be retired in the rank of BG with entitlement to all back pay, allowances and benefits to which he is entitled or as an alternative, that he be reinstated to the Florida Army National Guard (FLARNG) in the rank of BG from the date he otherwise would have been promoted to the date of reinstatement.

2. The applicant states, in effect, that he issued two letters of concern to officers under his command directing them to carefully screen all allegations of misconduct for bias, objectivity, validity and accuracy before forwarding them to his headquarters and to establish the proper Army-approved procedures to do so. He specifically informed them that the LOC was not a reprimand and would not be filed in the OMPF. He goes on to state that the LOC was simply counseling for failure to adhere to guidelines for processing of complaints and the waste of time and resources incurred thereby. He continues by stating that he did so because two investigations conducted under Army Regulation (AR) 15-6 in which allegations of misconduct had been forwarded had provided no evidence of any unlawful misconduct. However, the investigations did reveal that false allegations by the two officers had caused the investigations and that some type of action should be taken against the officers involved. He also states that while he could not determine

conclusively that the two officers had made false statements, he concluded that they should be counseled regarding their conduct. He continues by stating that the Department of the Army Inspector General (DAIG) contends that the LOCs were reprimands for making protected communications, which was not the case. They were the product of two investigations that compelled him to take action as a responsible and conscientious commander.

3. He also states that as a result of the investigations, one of the officers concerned, who was a battalion commander, relieved the company commander (a captain (CPT)) of the unit involved and in October 2000, the CPT requested a commander's inquiry be conducted regarding his relief for cause officer evaluation report OER and a missing OER. This was 2 weeks after he had filed a whistleblower complaint against him (the applicant) that resulted in the delay of his promotion to BG and was ultimately found to be unfounded. However, in the course of the investigation, the DAIG obtained approval from the Vice Chief of Staff of the Army to expand the investigation to include allegations of reprisal for making protected communications involving the two officers who received LOCs and who did not file complaints against him. After a 6-month investigation, the DAIG substantiated that he (the applicant) had failed to ensure that a subordinate commander was properly relieved from a command position, that he improperly prepared and processed an annual OER and that he reprised against two officers for making protected communications. As a result, he received a LOC from the Vice Chief of Staff of the Army. Consequently, he

was not restored to the BG Promotion List for confirmation by the United States Senate. He was informed that because his name had not been submitted to the Senate for confirmation, the process would have to begin anew, which is generally a 6 - 9 month process. He goes on to state that he underwent surgery for colon cancer on 16 July 2001 and before he was released from the hospital, he received orders transferring him to the Retired Reserve.

4. He continues by stating that from the onset of the investigation, he was denied his procedural right of notice and response. He was never informed by the DAIG, orally or in writing, of the specifics of the allegations against him. It was not until 14 March 2001, 5 months after his name was removed from the promotion list that he first learned of the allegations against him from the DAIG, when it conducted an interview with him and then only in a cursory manner.

5. The applicant provides in an extensive brief that includes a Resume', copies of his field grade OERs, eight letters of support, the results of an informal investigation, a copy of a memorandum of a meeting with the battalion commander in question regarding the results of the AR15-6 investigation, a copy of a memorandum to the State Judge Advocate General confirming that he concurred with the battalion commander's decision to relieve the company commander in question, a copy of an email memorandum of record regarding the applicant's meeting with the battalion commander regarding the AR15-6 investigation, the results of a

commander's investigation; copies of the two LOCs he issued to his two officers, a copy of the DAIG report of investigation (ROI), a copy of the directive for investigation directed by the Vice Chief of Staff of the Army (VCSA), a copy of a General Accounting Office (GAO) report dated December 2003, and copies of various emails.

COUNSEL'S REQUEST, STATEMENT AND EVIDENCE:

1. Counsel requests that the applicant be promoted by operation of law to the rank of BG, that the LOC from the VCSA be removed from his OMPF, that he be awarded all back pay, allowances and benefits to which he is entitled and that he be retired in the rank of BG with all rights and privileges or as an alternative, that he be reinstated to the FLARNG in the rank of BG from the date he otherwise would have been promoted to the date of reinstatement.

2. Counsel states, in effect, that a whistleblower complaint was filed against the applicant just before his name was to be submitted for confirmation to the Senate for promotion to the rank of BG. The complaint was made by a subordinate commander who had been relieved by a battalion commander and the applicant was unaware of the relief until after the officer had resigned. He goes on to state that while the DAIG found that the complaint of reprisal by the applicant was unsubstantiated, it sought to find something in which to find fault with and sought permission to expand the investigation to include allegations of reprisal against two other officers who had not filed a complaint. He continues

by stating that not only did the DAIG not have a legal basis for investigating the Military Whistleblower Protection Act complaint filed against the applicant because members of the National Guard who are not ordered into Federal service are not covered under the Act, they abused their authority during the course of the investigation, in that they requested authority from the VCSA to investigate matters for which the individuals concerned had not filed a complaint. Additionally, the DAIG violated the applicant's rights of notice and response because he was never officially notified of the basis for the investigation and thus denied him the fundamental right to prepare a defense or to submit matters in his own behalf.

3. He also states that the Army violated the applicable laws and regulations when it failed to notify the applicant in writing of its decision to delay his promotion and his right to respond in writing to the Secretary of the Army, which is a requirement of law. Furthermore, the Army violated the applicable law and regulations when it failed to obtain Secretary of the Army approval for delaying the applicant's promotion beyond the authorized 6-month period. He further states that the Army violated the applicable laws and regulations by delaying his promotion because the applicant's circumstances do not fit into the criteria for doing so because his promotion had already been delayed by the time the DAIG obtained authorization to conduct the investigation. Additionally, the complainant did not make a protected communication. He did not use command based procedures to resolve/redress his grievances and therefore, under AR 20-1, the DAIG

did not have jurisdiction to investigate the complaint.

4. He further states that not only did the complainant fail to exhaust his administrative remedies before filing his complaint with the DAIG, he also waited 9 months to do so, which is well beyond the 60 day period established by AR 20-1 and Department of Defense Directive 7050.6(5). Additionally, there was no legal basis for the DAIG to conduct an investigation on two officers who had not filed a complaint and the DAIG erroneously concluded that the LOCs were letters of reprimand and constituted threats against the affected officers, which served to impugn the applicant's moral and ethical character, as well as his fitness for continued service as a senior officer in the FLARNG. He continues by stating that the Army violated the applicable laws and regulations by not submitting the applicant's name for Senate confirmation as soon as it was determined that no disciplinary action was being taken against him and deprived him of the promotion he had earned.

5. He concludes by stating that the applicant and his family have suffered a grave injustice that fully warrants the granting of the relief requested. The Army's failure to adhere to the laws and regulations governing DAIG investigations and the delay of an officer's promotion have caused the applicant and his family great embarrassment, prejudice and humiliation. He (the applicant) lost the opportunity to serve our nation as a general officer, a position he earned through hard work and absolute dedication to the FLARNG, the Army and

our National defense. Accordingly, the evidence requires that the Board make the applicant whole again by granting his request in a formal hearing of his case.

6. Counsel provides no additional documents other than those contained in the brief submitted.

CONSIDERATION OF EVIDENCE:

1. Applicant was born on 28 April 1948 and was commissioned as a United States Army Reserve (USAR) air defense artillery (ADA) second lieutenant on 13 June 1970. He was ordered to active duty on 22 August 1970. He attended the ADA officer basic course (ADAOBC) at Fort Bliss Texas and accepted a Regular Army appointment on 4 September 1970.

2. Upon completion of ADAOBC he attended and successfully completed airborne, ranger and pathfinder training at Fort Benning, Georgia, before being assigned to Fort Bragg, North Carolina. He was promoted to the rank of first lieutenant on 22 August 1971 and was transferred to Korea on 25 November 1972.

3. He submitted his unqualified resignation and a request for a USAR commission to be effective 16 August 1973. He departed Korea on 15 August 1973 and was honorably released from active duty on 16 August 1973. He was transferred to the USAR Control Group (Reinforcement) and was promoted to the rank of captain on 23 March 1981. He transferred to the USAR Control Group (Ready) on 1

September 1985 and on 13 July 1987, he was promoted to the rank of major.

4. On 31 October 1987, he accepted an appointment as a major in the FLARNG. He was promoted to the rank of lieutenant colonel on 3 October 1992 and to the rank of colonel on 6 March 1996.

5. In March 1999, the applicant was selected by The Adjutant General (TAG) of the Florida National Guard (FNG) to assume command of a FNG Major Command and to serve simultaneously as the Deputy Commanding General
(CG) of the 32nd Army Air and Missile Defense Command (AAMDC), an active duty Army Headquarters.

6. On 27 July 2000, the applicant's selection for promotion to the rank of BG was announced by the Secretary of Defense and was submitted by the President to the Senate for confirmation on 13 September 2000.

7. On 28 September 2000, the DAIG received a memorandum from the IG, FLARNG referring a Title 10, United States Code (U.S.C), Section 1034 complaint (Military Whistleblower Protection) in which the applicant was accused of taking reprisal actions against a subordinate for making protected disclosures to his chain of command regarding criminal activities.

8. On 3 October 2000, the applicant was notified telephonically by the FNG TAG, a major general, that he was being removed from the general officer (GO) promotion list at the request of the DAIG based on a complaint having been filed against him.

9. On 6 October 2000, the applicant was notified by the Deputy DAIG (a major general) telephonically that a reprisal complaint had been filed against him only hours before his promotion was to be confirmed and that based on the complaint, his name was withheld by the Army from the list of officers whose promotions were confirmed by the Senate in October 2000.

10. On 16 January 2001, the FNG TAG again contacted the applicant and informed him that the allegation of reprisal against the complainant had been unsubstantiated. However, other issues had arisen out of the investigation that required the authority of the VCSA to investigate further.

11. The VCSA directed on 31 January 2001, that the DAIG investigate alleged improprieties by senior officials assigned to the 32nd AAMDC, FLARNG.

12. On 29 June 2001, the DAIG Report of Investigation (ROI) concluded that the applicant had failed to ensure that a subordinate commander was properly relieved from a command position, that he had improperly prepared and processed an annual OER on the complainant (report was not adverse) and that he had reprised against officers for making protected communications. The VCSA approved the DAIG ROI on 29 June 2001 as well.

13. In support of his application, the applicant provides a copy of an electronic mail (e-mail) to 35 individuals informing them of his decision to voluntarily retire from the FLARNG effective 31 July 2001. He also informed them that he had been diagnosed with colon cancer, that it was fully operational and he expected to resume a normal healthy life after surgery on 16 July. He further explained that after satisfactory completion of the IG investigation he would be able to have his name resubmitted for confirmation; however, he had chosen not to go back through the 6 to 9 month process.

14. On 31 July 2001, the applicant was transferred to the USAR Control Group (Retired) due to maximum authorized years of service.

15. On 19 October 2001, the VCSA issued the applicant a Memorandum of Concern (MOC) in which he indicated that he was not officially reprimanding him because he believed that the applicant's actions resulted from his belief that his actions were in the best interests of the unit, the soldiers assigned to the unit and the Army. He also indicated that he was aware that the applicant had received incorrect legal advice; however, he (the VCSA) expected him to reflect on his future conduct. He specified that the MOC would not be filed in his records and he considered the matter closed.

16. In the processing of this case, a staff advisory opinion was obtained from the National Guard Bureau (NGB) which opines, in effect, that the applicant's name was properly withheld in accordance with Department of Defense Instructions (DODI) 320.4, paragraph 6.2.1.7, and that his nomination should now be forwarded by the NGB to the Senate for consideration for confirmation. If confirmed, his records should be corrected to reflect promotion to the rank of BG with a date of rank (DOR) of 6 October 2000, with subsequent retirement as a BG on 31 July 2001. The opinion also noted that the MOC is not filed in the applicant's records and thus there is no basis to take any action to remove it from his records.

17. The advisory opinion was provided to the applicant for comment and he responded through counsel to the effect that while he agrees with the opinion of the NGB that he be promoted to the rank of BG effective 6 October 2000, he disagrees with the NGB's presumption that his promotion was legally and correctly withheld. He goes on to state that he contests the lawfulness of the investigation that caused his removal from the promotion list as well as the procedures employed for achieving his removal. Additionally, the DAIG investigation and the procedures used to remove him from the promotion list were unlawful and the factual conclusions of the investigation that gave rise to his removal were erroneous. Furthermore, neither the NGB or the Army have addressed his allegations that he was never notified in writing of the delay in his promotion nor afforded the opportunity to submit matters in rebuttal. Additionally, the Army failed to

obtain Secretary of the Army approval for delays beyond the 6-month delay period, the Army had no lawful basis for investigating the allegations of reprisal, the DAIG had no lawful basis for conducting the investigation and thus had no lawful basis to delay his promotion. He also contends that he would not have resigned had he not been given erroneous and misleading information by senior officials of the FLARNG and his resignation should be voided. Accordingly, the Board should void his retirement of 31 July 2001 and make it effective the date of the Board action, so that he can be credited with 3 years time in grade as a BG and qualify for full retirement benefits in that grade.

18. In the processing of this case, the staff of the Board requested copies of the advisory opinions used by the NGB and the General Officer Management Office (GOMO) and associated documents that were used to form the original advisory opinion provided to the Board. The memorandum provided by the NGB Administrative Law Team opines that the NGB GOMO should review the applicant's case to determine if his name should be returned to the Senate for confirmation based on all of the circumstances of his case. The LOC, if filed in the applicant's records should be reviewed to determine if all of the required procedures were followed prior to such filing, otherwise it should be removed if proper procedures were not followed. The opinion from the GOMO indicates that The Secretary of Defense requested that Congress withhold the applicant's nomination until the investigation was complete and a determination of suitability was made, which effectively authorized a promotion

delay past a 6-month period. Officials from the GOMO further opined that because the applicant had retired, his nomination was appropriately withdrawn from the Senate. Had he not retired, his nomination would have presumably been reviewed and a decision made to either support or withdraw it based on a recommendation from the adverse panel and the response from the applicant (if referred for comment). The GOMO advised that if the Board sought to grant the applicant relief, that it direct the Army to hold an adverse panel to review the applicant's adverse information and make a recommendation to the Acting Secretary of the Army on whether his nomination should be or would have been supported.

19. The information obtained by the staff of the Board was provided to the applicant's counsel for comment and he responded to the effect that the opinion from the GOMO that the applicant's nomination for promotion was lawfully withheld is incorrect because the applicant was not notified in writing of the delay or withholding of his promotion and he was not afforded the opportunity to respond to The Secretary of the Army. He also opines that the Secretary of Defense, by law, did not have the authority to authorize delays beyond the 6-month period, as that authority lies exclusively with the Secretary of the Army. He further disagrees with the opinion that the applicant's records be placed before an adverse panel or promotion review board to determine the applicant's suitability for promotion because there is no requirement in Statute or regulations that require such actions and because there is no adverse information to consider. He goes

on to state that the applicant did not voluntarily retire, that he never submitted an application or request for retirement. In regards to the opinion from the Administrative Law Team, he opines, in effect, that the NGB considered his input at the time and it should not be re-litigated. He contends that the NGB considered all of the information at the time and agreed with the applicant's position that relief was warranted.

20. The GAO Report provided by the applicant with his application reviews the Federal Recognition Process for Recently Promoted Senior Officers and Federal Protection for National Guard Whistleblowers and is dated December 2003. The report indicates that according to the Constitution, States have the authority to appoint officers in their State National Guard units. However, because National Guard officers also have a Federal status, state-promoted officers must go through a second review process – the Federal Recognition Examination – to ensure that they meet Federal promotion requirements. The Federal process for individuals promoted to or within the rank of general officer is managed and overseen by general officer management offices (GOMO) within the NGB and the Offices of the Chief of Staff of the Army and Air Force. These offices review the files of nominated officers and confirm that they meet all objective promotion criteria before the nominations are sent to the Federal Recognition Board for review. They also ensure that the required background checks are conducted in order to identify any adverse information about an individual. Department of Defense (DOD) instructions require the services to

examine all systems of records maintained by DOD for any adverse information that may exist on a nominee. This examination would include files in the offices of the State and service Inspector General, The Judge Advocate General, the General Counsel, the Equal Employment Opportunity Office, and the appropriate service criminal investigation agency. If an allegation emerges during the process, the nomination is held in abeyance until necessary investigations are completed.

21. In regards to Federal Protection for National Guard Whistleblowers, the GAO Report states that Federal Protection for National Guard Whistleblowers are limited by the dual Federal-State statutes. Federal protections apply only to Guard members who are in Federal duty or training status. Federal protections do not apply to Guard members who are in a State active duty status; their protections, if any, derive from State law. The military whistleblower protection statute requires the DODIG to expeditiously investigate a whistleblower's allegation of reprisal that it receives within 60 days of the member's initial awareness of an adverse action.

22. DODI 7050.6, Military Whistleblower Protection, provides the policies and responsibilities for military whistleblower protection. It provides, in pertinent part, that no person may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, in reprisal against any member of the Armed Forces for making or preparing a protected communication. It goes on to state that no investigation is required

when a member of the Armed Forces submits a complaint of reprisal to an authorized IG more than 60 days after the date that the member became aware of the personnel action that is the subject of the allegation. It also provides that the DODIG shall investigate or oversee DoD Component IG investigations of allegations of reprisal when it receives notification from a Military Department IG of reprisal allegations submitted to them by members or former members of the Armed Forces and expeditiously notify the Military Department IG concerned of decisions to retain such allegations for investigation. That instruction defines a member of the Armed Forces as all Regular and Reserve Component members of the Army, Navy, Air Force, Marine Corps and Coast Guard (when operating as a military service in the Navy) on active duty; and Reserve Component members in any duty or training status (includes officers and enlisted members of the National Guard).

23. Army Regulation 20-1 prescribes the responsibilities, policies and duties and procedures of the Inspector General (IG). It provides, in pertinent part, that the regulation applies to members of the Active Army, the Army National Guard (including periods when operating in its National Guard capacity if a Federal interest exists), the Army Reserve and Department of the Army civilian employees and nonappropriated fund employees. It further provides, in pertinent part, that the IG will process DOD Hotline cases that relate to Army activities, will process DOD whistleblower reprisal cases that relate to Army activities and that the IG will conduct investigations

and inquiries directed by the Secretary of the Army, the Under Secretary of the Army, the Chief of Staff of the Army, the VCSA, or as determined necessary by The Inspector General (TIG). The IG sphere of activity includes everything for which the commander is responsible to the United States and over which the commander or State Adjutant General has Federal authority. The definition of Federal interest, as used in this regulation, means those areas in which the Federal Government has legitimate concern. By definition, if the matter is not of Federal interest, it is a matter of State interest. In the abstract, the role of the active Army IG in Army National Guard matters is relatively simple. If the issue the IG is looking at involves a Federal interest, the Active Army IG may inspect, investigate, or assist. If the issue does not involve a Federal interest, the Active Army IG cannot act. Application of the simple principle is not so easy. Lines of demarcation can not be drawn, thus each case must be looked at independently to determine if Federal interest exists. The authority of the active IG to act in ARNG matters is very broad but not without limitations. All questions of Federal versus State interest will be discussed with the Staff Judge Advocate office. The following are included within the area of Federal interest: the organization, training, operations, supply, procurement, fiscal matters connected with ARNG, examination of material prepared relevant to the returns and reports State Adjutants General are required to make to the Secretary of the Army, activities that, if true, would be a basis for withdrawal of Federal Recognition, and exercise of command function, although generally a matter of State interest, which

include, but are not limited to, substandard performance of duty and moral or professional dereliction.

24. The 32nd Army Air and Missile Defense Command (AAMDC) is a one-of-a-kind theater level Army air and missile defense multi-component organization with a worldwide 72-hour deployment mission. The 32nd AAMDC is based at Fort Bliss, Texas and falls within the authority and under the operational control of United States Forces Command (FORSCOM). Current Army authorization documents provide for two AAMDC's (one Active/Reserve Component and one fully Reserve Component). Detachment 1, 32nd AAMDC is located at Orlando, Florida, and the commander of that detachment also serves as the deputy commander of the 32nd AAMDC, under the Total Force concept.

DISCUSSION AND CONCLUSIONS:

1. The applicant's contention that his promotion was unjustly and illegally withheld from Senate confirmation has been noted and found to be without merit.

2. While the applicable laws and regulations indicate that a whistleblower complaint should be received within 60 days of discovery, it does not preclude the Department from considering or investigating complaints after 60 days.

3. Although the complaint that was received at the time the applicant was scheduled for Senate confirmation for promotion to the rank of BG was subsequently determined unfounded for reprisal, the investigation uncovered additional information that would be expected to be made available for Senate confirmation, regardless of how serious or unimportant the applicant may deem it. Accordingly, his name was properly withdrawn until such time as the investigation was finalized.

4. The Army had a Federal interest in the applicant not only due to his status as an officer but also in regards to Federal Recognition and his position as the deputy commander of a one-of-a kind unit that is also an active Army unit with a contingency/deployment mission. Accordingly, the IG had a responsibility to investigate any matters it deemed appropriate to the events at hand (regardless of the outcome) if authorization from the appropriate authority was obtained beforehand. Such authorization was obtained from the VCSA in accordance with the applicable regulations and there appears to be no violations of the applicant's rights in that matter.

5. The evidence surrounding the applicant's notification of removal from the confirmation list, or the lack thereof, is not present in the available evidence; however, the applicant acknowledges that he was notified telephonically by senior officials. While the lack of written notification is not condoned, there is no evidence submitted by the applicant with his application to support that contention or evidence of any harm that resulted

from his telephonic notification vice written notification.

6. There is also no evidence in the available records to show that there were undue or unnecessary delays in completing the investigation. The evidence does suggest that under normal procedures, the applicant's name should have been resubmitted for review by a promotion review board (PRB) under the standard procedure used to determine if his nomination should have been forwarded for Senate confirmation, after the results of the investigation were finalized.

7. However, the investigation was concluded on 29 June 2001 and the applicant was transferred to the Retired Reserve on 31 July 2001, due to maximum years of service. While it is unfortunate that the applicant reached his maximum years of service before he could be reconsidered for promotion, the evidence does not suggest that there was any conspiracy or specific effort to deny him an opportunity to be re-considered for promotion. The clock simply ran out on him as it does on many officers in similar circumstances.

8. Although the applicant does not agree with the findings of the IG, there were substantiated findings that would have required another look by a PRB process to determine if his name should be resubmitted for confirmation by the Senate. The PRB process is not a short process and is one that requires several months to accomplish. Accordingly, once he had met his maximum years of service and

was transferred to the Retired Reserve, he was no longer eligible to be considered for promotion.

9. The applicant's contention that he should be promoted by operation of law has been noted and also found to be without merit. The applicant was not considered for confirmation by the Senate and to promote him without Senate confirmation would afford him a benefit not afforded to others in similar situations and would circumvent the applicable laws and regulations and long-standing policies governing the promotion of commissioned officers.

10. The applicant clearly made the decision not to undergo the promotion review process again, as evidenced by the 15 July 2001 email he provided with his application. This is further supported by the fact that the orders transferring the applicant to the Retired Reserve on 31 July 2001 indicate that he was retired by reason of maximum years of service and the applicant waited almost 3 years before applying to this Board. While he was not precluded from waiting or changing his mind at a later date, it also is indicative that he chose not to undergo the process again and not that he was denied the opportunity to do so as he claims.

11. The applicant's contention that the LOC should be removed from his OMPF has been noted and found to be without merit. The LOC issued by the VCSA is not contained in the applicant's records and it specifically states that it would not be filed in his personnel record; therefore, since he has failed to show that it is present in his records, there is no basis to approve his request to have it removed.

12. Notwithstanding the favorable advisory opinions obtained from the NGB which opine that the applicant's nomination should have then and should be now forwarded to the Senate for consideration for confirmation, by the time the investigation was completed and his nomination/records could have been reviewed by a PRB, he would have reached his maximum years of service and the result would have been the same even if it had been submitted the day after the investigation had been completed.

12. Accordingly, the evidence suggests that his nomination was properly withheld from the Senate in accordance with the applicable directives and by the time the investigation was completed he had essentially run out of time before reaching his maximum years of service. Although it is unfortunate, it does not constitute an error or injustice that warrants granting him a promotion without Senate confirmation or granting him the opportunity to receive Senate confirmation when he was no longer eligible.

13. In order to justify correction of a military record the applicant must show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the record is in error or unjust. The applicant has failed to submit evidence that would satisfy this requirement.

BOARD VOTE:

_____ _____ _____ GRANT FULL RELIEF

_____ _____ _____ GRANT PARTIAL RELIEF

_____ _____ _____ GRANT FORMAL HEARING

/s/ /s/ /s/ DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

/s/
CHAIRPERSON

[FILED: MARCH 23, 2004]

**APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552**

*(Please read instructions on reverse side BEFORE completing application.)*

*Form Approved*
*OMB No. 0704-0003*
*Expires Sep 30, 2003*

The public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0003), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

**PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE ABOVE ADDRESS. RETURN COMPLETED FORM TO THE APPROPRIATE ADDRESS ON THE BACK OF THIS PAGE.**

## PRIVACY ACT STATEMENT

**AUTHORITY:** Title 10 US Code 1552, EO 9397.

**PRINCIPAL PURPOSE:** To initiate an application for correction of military record. The form is used by Board members for review of pertinent information in making a determination of relief through correction of a military record.

**ROUTINE USE(S):** None.

**DISCLOSURE:** Voluntary; however, failure to provide identifying information may impede processing of this application. The request for Social Security number is strictly to assure proper identification of the individual and appropriate records.

1. **APPLICANT DATA**

a. BRANCH OF SERVICE *(X one)*

[ X ] ARMY
[ ] NAVY
[ ] AIR FORCE
[ ] MARINE CORPS
[ ] COAST GUARD

b. NAME *(Last, First, Middle Initial) (Please print)*

Appleby, Charles C

c. PRESENT PAY GRADE

retired O-6

d. SERVICE NUMBER *(If applicable)*

e. SSN

267-76-4826

2. **TYPE OF DISCHARGE** *(If by court-martial, state type of court)*

HONORABLE

3. **PRESENT STATUS, IF ANY, WITH RESPECT TO THE ARMED SERVICES** *(Active duty, Retired, Reserved, etc.)*

RETIRED

4. **DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY** *(YYYYMMDD)*

July 31, 2001

5. **ORGANIZATION AT TIME OF ALLEGED ERROR IN RECORD**

Florida Army National Guard

6. **I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C.** *(No expense to the Government) (X one)*

[ X ] Yes [ ] No

7. **COUNSEL** *(If any)*

a. NAME *(Last, First, Middle Initial)*

Toney, Raymond J.

b. ADDRESS *(Street, Apartment Number, City, State and ZIP code)*

Law Offices of David P. Sheldon
512 8th street S.E. Washington, D.C. 20003

8. **I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE:**

See memorandum in support of application

9. **I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS:**

See memorandum in support of application

10. **IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING:** *(If Veterans Administration records are pertinent to your case, give Regional Office location and Claim number.)*

See memorandum in support of application

11. **ALLEGED ERROR OR INJUSTICE**

a. DATE OF DISCOVERY *(YYYYMMDD)*

2001/07/31

b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THIS APPLICATION.

12. **APPLICANT MUST SIGN IN ITEM 16. IF THE RECORD IN QUESTION IS THAT OF A DECEASED OR INCOMPETENT PERSON, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY APPLICATION. IF APPLICATION IS SIGNED BY OTHER THAN APPLICANT, INDICATE RELATIONSHIP OR STATUS BY MARKING APPROPRIATE BOX.**

[ ] **SPOUSE**
[ ] **WIDOW**
[ ] **WIDOWER**
[ ] **NEXT OF KIN**
[ ] **LEGAL REPRESENTATIVE**
[ ] **OTHER** ***(Specify)***

13. **I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM.** *(U.S. Code, Title 18, Sec. 287, 1001, provides that an individual shall be fined under this title or imprisoned not more than 5 years, or both.)*

14.a. **COMPLETE CURRENT ADDRESS, INCLUDING ZIP CODE** *(Applicant should forward notification of all changes of address.)*

2658 Sims Cove Lane, Jacksonville, Florida, 32223

b. TELEPHONE NUMBER *(Include Area Code)*

904-268-1304

15. **DATE SIGNED** *(YYYYMMDD)*

2004/03/23

16. **SIGNATURE** *(Applicant must sign here.)*

*/s/*

**DOCUMENT NUMBER** *(Do not write in this space.)*

88871
AR2004105941

Department of Defense
**INSTRUCTION**

**NUMBER** 1320.4
March 14, 1995

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ASD(FMP)

SUBJECT: Military Officer Actions Requiring Approval of the Secretary of Defense or the President, or Confirmation by the Senate

References: (a) DoD Instruction 1320.4, "Military Officer Actions Requiring Approval of the President or Secretary of Defense or Confirmation by the Senate," October 29, 1981 (hereby canceled)

(b) Title 10, United States Code

(c) United States Constitution, Article, Section II, Clause 1 and Clause 2

(d) DoD Directive 1320.12, "Defense Officer Promotion Program," February 4, 1992

1. REISSUANCE AND PURPOSE

This Instruction:

1.1 Reissues reference (a) to implement policy and updates responsibilities and procedures under reference (b).

1.2. Continues to implement references (b), (c) and (d) and prescribes administrative procedures governing the submission of military officer personnel actions for grades O-1 through O-10 requiring approval of the Secretary of Defense or the President, or confirmation by the Senate.

2. APPLICABILITY

This Instruction applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Defense Agencies, DoD Field Activities, and the Inspector General of the Department of Defense (IG, DoD) (hereafter referred to collectively as "the DoD Components"). The term "Secretaries of the Military Departments," as used herein, refers to the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force. The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps. It also refers to the Coast Guard when it is operating as a Service of the Department of the Navy.

3. DEFINITIONS

3.1. Adverse Information. Any substantiated adverse finding or conclusion from an officially documented investigation or inquiry.

3.2. Alleged Adverse Information. Any allegation of conflict of interest, failure to adhere to required standards of conduct, abuse of authority, misconduct or information serving as the basis for an incomplete or unresolved official investigation or inquiry into a possible conflict of interest or failure to adhere to standards of conduct or misconduct.

(The definitions in paragraphs 3.1. and 3.2., above, are not all-inclusive and do not relieve the Secretaries of the Military Departments from advising the Secretary of Defense, through the Assistant Secretary of Defense for Force Management Policy (ASD(FMP)), of significant factual information that might affect the nomination process. This includes administrative, judicial and non-judicial punishment proceedings.)

3.3. GFO. Refers to general and flag officers and to officers selected for promotion or appointment to general or flag officer grades.

3.4. Military Officer Personnel Actions. Includes all actions involving grades O-1 through O-10 that pertain to designations, nominations, appointments, reappointments, extensions, assignments, reassignments, promotions, retirements, selection board reports, and all related necessary recommendations and documentation.

This term also includes all actions relating to officers nominated to, or selected for, such grades.

4. POLICY

It is DoD policy that:

4.1. The Secretaries of the Military Departments shall follow standard procedures when submitting military personnel officer actions requiring approval of the President or the Secretary of Defense, or confirmation by the Senate. These procedures shall enable the Secretaries of the Military Departments to determine what information is required for a nomination, when to submit a nomination, and the format to use when nominating an officer(s) for military officer personnel actions. Those military officer personnel actions requiring approval by the President or confirmation by the Senate shall be treated as Presidential correspondence.

4.2. The Department of Defense shall fully inform the President and the Senate of adverse information relating to officers who are the subjects of military officer personnel actions covered by this Instruction.

5. RESPONSIBILITIES

5.1. The Assistant Secretary of Defense for Force Management Policy, under the authority of the Under Secretary of Defense for Personnel and Readiness shall monitor compliance with this Instruction.

5.2. The Secretaries of the Military Departments shall submit nominations for military officer personnel actions in accordance with this Instruction and references (b), (c), and (d).

6. PROCEDURES

6.1 Actions Involving General and Flag Officers

6.1.1 General

6.1.1.1. The Secretaries of the Military Departments shall forward their proposed military officer personnel actions on three- and four-star nominations and one- and two-star promotion board reports by memorandum to the Secretary of Defense through the ASD(FMP) and, when required by reference (b), such nominations shall be transmitted through the Chairman of the Joint Chiefs of Staff. The nomination package shall include those items specified in enclosure 1.

6.1.1.2. The Secretaries of the Military Departments shall ensure that all investigative files, to include Equal Employment Opportunity files, are reviewed prior to forwarding a nomination to the Secretary of Defense for GFO actions requiring approval by the Secretary of Defense or the President, or confirmation by the Senate. Based on those reviews, the Secretaries of the Military Departments shall forward through the Chairman of the Joint Chiefs of Staff any adverse information as prescribed in paragraph 6.2., below,

or, if no adverse information, make the following certification:

6.1.1.2.1. All systems of records, to include Equal Employment Opportunity files and the Standard Form 278 (Public Financial Disclosure Report) [Delete SF 278 reference for one star nominations], maintained in the Department of Defense that pertain to this/these officer(s) have been examined. The files contain no adverse information about this/these officer(s) since his/her/their last Senate confirmation. Further, to the best of my knowledge, there is no planned or ongoing investigation or inquiry into matters that constitute alleged adverse information on the part of this/these officer(s).

6.1.1.2.2. The requirement to forward adverse information or this certification only applies to adverse information concerning the officer since his or her last Senate confirmation, except as prescribed in subparagraph 6.2.1.11., below. The Military Service concerned shall provide the official notification to the Secretary of Defense through the ASD(FMP) that there is, or is not, adverse or alleged adverse information on an officer(s).

6.1.1.3. In conjunction with the Military Service's review of investigative files, the IG, DoD, shall review its investigative files and notify the ASD(FMP) regarding adverse or alleged adverse information. The ASD(FMP) shall not process a nomination until the IG, DoD notification is received or if the IG, DoD notification is older than

60 days from the date of receipt of the nomination by the Office of the ASD(FMP). The IG, DoD notification shall be current from the date the nomination is received in the Office of the ASD(FMP) until the nomination reaches the Senate. In those instances where the IG, DoD notification is more than 60 days old, the ASD(FMP) shall notify the Military Service concerned and request an update of investigative files from the IG, DoD. The IG, DoD shall in turn, provide the results of the update to the Office of the ASD(FMP) and the Military Departments concerned.

6.1.1.4. In those instances where a nomination is received in the Office of the ASD(FMP) and the Military Department concerned requests that the nomination be held, the ASD(FMP) shall do so for no more than 2 duty days. If by the end of the second day, the Office of the Assistant Secretary of Defense for Force Management Policy (OASD(FMP)) does not receive a memorandum indicating that a Secretary of a Military Department wishes to have the nomination delayed, the nomination shall be processed.

6.1.2 Three- and Four-Star Nomination Requirements

6.1.2.1. The Secretary of Defense shall submit all military officer personnel actions involving three- and four-star officers to the President. All nominations shall be based on the recommendations of the Secretary of the appropriate Military Department and, if required by reference

(b), the advice of the Chairman of the Joint Chiefs of Staff.

6.1.2.2. The Secretaries of the Military Departments shall include in their nomination packages a memorandum to the President that provides the age of the officer; the proposed assignment; the authorized grade for the proposed assignment; the grade and name of the officer being replaced; whether the replacement officer is retiring and, if so, the projected date of retirement; whether the incumbent officer is being nominated for another position or otherwise is being reassigned; the number of joint duty or joint equivalent assignments the officer has served; whether the officer has been awarded the joint specialty; whether the officer has attended Senior Service School; and, information indicating the effect the proposed action would have on statutory grade ceilings for that grade. Additionally, the memorandum shall set forth the qualifications needed by an officer to carry out effectively the duties and responsibilities of the proposed assignment.

6.1.2.3. The Chairman of the Joint Chiefs of Staff shall submit to the Secretary of Defense his or her evaluation of the performance of the officer as a member of the Joint Staff, in other joint duty assignments, as required by reference (b). That evaluation shall then be sent to the Secretary of Defense, through the ASD(FMP). The Secretary of Defense shall include the Chairman of the Joint Chiefs of Staff's evaluation when the nomination is sent to the President. When reference

(b) requires that each Secretary of a Military Department provide a nomination for a position, the Chairman of the Joint Chiefs of Staff's memorandum shall state whether this requirement has been met.

6.1.2.4. The Chairman of the Joint Chiefs of Staff shall monitor the Military Services to ensure that grade ceilings prescribed in reference (b) are not exceeded.

6.1.2.5. The Chairman of the Joint Chiefs of Staff may also nominate officers to the Secretary of Defense for O-9 and O-10 joint duty billets as provided in reference (b). When those nominations are made, the Chairman of the Joint Chiefs of Staff shall ensure that all appropriate investigative files are reviewed as prescribed in subparagraph 6.1.1.2., above, prior to submission of the nomination to the Secretary of Defense. In conjunction with that review, the Chairman of the Joint Chiefs of Staff shall also ensure that the IG, DoD, advises whether there is adverse or alleged adverse information on an officer and that the IG, DoD, notification is no more than 60 days old. If there is adverse or alleged adverse information about the officer, then the Chairman of the Joint Chiefs of Staff shall process the nomination using the procedures outlined in paragraph 6.2., below.

6.1.3 One- and Two-Star Nominations

6.1.3.1. The Secretary of Defense shall submit to the President all actions involving one- and two-star officers requiring Presidential approval or Senate confirmation, as

prescribed by reference (b). When submitting promotion board reports, the Secretaries of the Military Departments shall forward the proposed action by memorandum to the Secretary of Defense and, when required by reference (b), through the Chairman of the Joint Chiefs of Staff. The memorandum shall forward a copy of the memorandum from the Chairman of the Joint Chiefs of Staff that designated the joint representative for the promotion board and shall also include a statement that the Acquisition Corps promotion statistics have been coordinated with the Under Secretary of Defense for Acquisition and Technology.

6.1.3.2. After the issue relating to adverse information outlined in subparagraph 6.2.1.8., below, is resolved, the Secretary of the Military Department concerned shall submit a memorandum to the Secretary of Defense, through the ASD(FMP). The memorandum shall indicate if the Secretary of the Military Department concerned still supports the nomination for promotion and shall also include the required information in subparagraphs 6.1.1.1., 6.1.1.2., and 6.1.1.3., above, and enclosure 3.

6.2 Processing Adverse or Alleged Adverse Information on GFOs

6.2.1 General

6.2.1.1. Normally, the Department of Defense does not report alleged adverse information or other unsubstantiated allegations to the Senate. However, in extraordinary

cases, such as where the allegations received significant media attention or when the Senate Armed Service Committee (SASC) brings allegations to the attention of the Department of Defense, the Secretaries of the Military Departments shall include a discussion of the unsubstantiated allegations in the nomination package. When appropriate, the nomination package shall also include a summary of the information as outlined in enclosure 3.

6.2.1.2. Before a Secretary of a Military Department submits a nomination with adverse information to the Secretary of Defense and the Chairman of the Joint Chiefs of Staff, the Military Department's staff element concerned are encouraged to consult informally with their OSD counterparts on the content of the summary of adverse information (see enclosure 3). Such consultation shall be in addition, and without prejudice, to subsequent review and coordination by the OSD counterparts.

6.2.1.3. In those cases when a promotion board report has been received in the OSD and the OASD(FMP) and/or the General Counsel of the Department of Defense (GC, DoD) requests clarification or additional information from the Secretary of the Military Department concerned on an officer(s) with adverse information or alleged adverse information, the timeframes at enclosure 4 shall be used to determine the length of time the OSD office concerned shall be allowed to resolve the issue. If, the issue is not resolved after the time prescribed at enclosure 4, the promotion board

report nomination package shall be retrieved from the OSD office concerned. At the time the nomination package is retrieved by the OASD(FMP), the OSD office concerned shall have coordinated on the nomination package with respect to the officer(s) on the promotion board report without adverse information. If appropriate, the OSD office concerned may provide a memorandum that will be included in the nomination package with respect to the officer(s) with adverse or alleged adverse information. The ASD(FMP) will in turn, process the promotion nomination package to the Secretary of Defense with a recommendation to withhold the officer(s)' name from the nomination scroll pending further review by the OSD office concerned. Before the ASD(FMP) makes that recommendation to the Secretary of Defense, the OASD(FMP) shall request that the Military Service provide a new scroll without the name(s) of the officer(s) with adverse information or alleged adverse information.

6.2.1.4. The adverse information summaries at enclosure 3 shall be included as part of the package when submitting the nomination to the Chairman of the Joint Chiefs of Staff and the ASD(FMP). When the nomination with adverse information or, pursuant to subparagraph 6.2.1.1., above, with alleged adverse information, is sent to the Office of the ASD(FMP), a copy of the completed investigation or inquiry shall also be included with the nomination package.

6.2.1.5. The ASD(FMP), when advising the Director, White House Military Office (WHMO), of the adverse or alleged adverse information, shall attach copies of the adverse information summary formats at enclosure 3 to his memorandum. If the President signs the nomination and forwards it to the Senate, the ASD(FMP) shall send a letter (minus the adverse information cover sheets) to the Chairman, SASC, advising of the adverse or alleged adverse information.

6.2.1.6. The ASD(FMP) shall initiate monthly checks with the Military Services and the IG, DoD, on all nominations that have been received by the Senate, but not yet confirmed. If, after the nomination reaches the Senate, the Military Service concerned or the IG, DoD, identify any adverse information or alleged adverse information not previously reported, the cognizant DoD component shall notify the Office of the ASD (FMP) within 5 duty days of receipt of adverse or alleged adverse information. In addition, the IG, DoD shall notify the ASD(FMP) when notified by a Military Service of adverse or alleged adverse information. The notifications shall be in writing and shall include the officer(s)' grade, name, and a synopsis of the allegation(s). For the Military Services, the notification letter shall also include the date the allegations were received by the Military Service concerned. The ASD(FMP), with the verbal concurrence of the Director, WHMO, and the Executive Secretary of the Department of Defense shall then advise the SASC of the information and request that the nomination be held in abeyance until the matter is resolved.

6.2.1.7. In those cases where the officer(s) identified with adverse or alleged adverse information is on a promotion list as outlined in subparagraph 6.2.1.6., above, the ASD(FMP), with the verbal concurrence of the Director, WHMO, and the Executive Secretary of the Department of Defense shall advise the SASC, and ask it to defer nomination of the officer(s) concerned while permitting the remaining officers on the list to continue forward for confirmation. The ASD (FMP) shall provide the Secretary of Defense copies of the memorandum sent to the Director, WHMO and letter sent to the Chairman, SASC advising of the requests made under this subparagraph. The ASD(FMP) shall also advise the Chairman of the Joint Chiefs of Staff.

6.2.1.8. When an investigation or inquiry is completed on an officer(s) whose nomination is on hold at the SASC under subparagraph 6.2.1.6., above, the Secretary of the Military Department concerned shall so inform the Secretary of Defense, through the ASD(FMP), in writing. The Secretary of the Military Department's notification shall state if the allegations were substantiated, what action was taken, if any, and whether or not the Secretary of the Military Department still supports the nomination. In those cases where the allegation is substantiated and the Secretary of the Military Department and the Secretary of Defense support the nomination, that nomination shall be processed for approval to the President. If the President continues to support the nomination, the ASD(FMP) shall advise the SASC to proceed with the confirmation process. If, based on

the adverse information, the Secretary of the Military Department does not support the nomination, the Secretary of the Military Department concerned shall submit a new nomination package to the Secretary of Defense, through the ASD(FMP), requesting that the President withdraw the nomination from the SASC. In those instances where the allegation is unsubstantiated, the ASD(FMP), with the verbal concurrence of the Director, WHMO, and the Executive Secretary of the Department of Defense shall advise the SASC of the outcome of the investigation or inquiry and request that the nomination proceed forward for confirmation. The ASD(FMP) shall provide the Secretary of Defense copies of the memorandum sent to the Director, WHMO and the letter sent to the SASC advising of the action taken. The ASD(FMP) shall also advise the Chairman of the Joint Chiefs of Staff.

6.2.1.9. When an investigation or inquiry is opened on a nomination that has been signed by the President, but has not yet reached the Senate, the Secretary of the appropriate Military Department shall notify the ASD(FMP), in writing, within 5 duty days of receipt of the information. The notification shall include the officer's grade, name, a synopsis of the allegations, and the date the allegations were received by the Military Service concerned. The ASD(FMP) shall then notify the Director, WHMO, of the adverse or alleged adverse information and request processing of the nomination be stopped. In those instances where a nomination has not been signed by the President and an investigation or inquiry is opened,

the ASD(FMP) shall request the Director, WHMO, put the nomination on hold pending further review. This action shall then be followed up with a letter to the Director, WHMO, prepared by the ASD(FMP) and signed by the Executive Secretary of the Department of Defense. The ASD(FMP) shall then advise the Secretary of the Military Department concerned, in writing, of the action taken with the Director, WHMO. After the investigation or inquiry is complete, the Secretary of the Military Department concerned shall resubmit the nomination as prescribed by subparagraph 6.2.1.8., above.

6.2.1.10. In those situations where the ASD(FMP) is advised of adverse or alleged adverse information on an officer(s) on a promotion board report, the ASD(FMP) shall put the board report on hold, and then request that the Military Service concerned provide a new scroll without the officer(s)' name(s), so the remainder of the promotion board report can proceed forward to the President for approval and to the Senate for confirmation. The ASD(FMP) shall notify the Secretary of Defense and the Chairman of the Joint Chiefs of Staff of the action taken on the promotion board report. If the President has signed the promotion list, but has not yet sent it to the Senate, at the time adverse or alleged adverse information is identified about an officer or an investigation or inquiry is opened, the ASD(FMP) shall request that the Director, WHMO hold the promotion list pending resolution of the matter. This action shall be confirmed by a letter to the Director, WHMO prepared by the ASD(FMP) and signed by the Executive Secretary of the

Department of Defense. The ASD(FMP) shall also advise the Secretary of Defense and the Chairman of the Joint Chiefs of Staff of the action taken with the Director, WHMO. In addition, the ASD(FMP) shall provide the Secretary of Defense bi-monthly status updates until action is completed or until the Secretary of the Military Department concerned determines disposition of the promotion list. Once the matter is resolved, the Secretary of the Military Department concerned shall notify the Secretary of Defense, through the ASD(FMP), in writing, of his or her recommended action as prescribed by subparagraph 6.2.1.8., above.

6.2.1.11. As a matter of policy, the Secretary of a Military Department concerned shall provide to the Office of the ASD(FMP) all adverse information since an officer's last Senate confirmation. Additionally, for promotion to O-7, the Secretary of the Military Department concerned shall review all adverse information during the last 10 years of an officer's career to identify trends. The Secretary of the Military Department concerned need not report adverse information identified during that 10 year review unless, in his or her judgment, such information would affect the nomination process. If a Secretary of a Military Department concerned decides to provide the adverse information as part of the nomination as prescribed in subparagraph 6.1.1.2., above, the information shall be provided to the Secretary of Defense, through the ASD(FMP), as prescribed in subparagraphs 6.2.1.2. and 6.2.1.3., above and enclosure 3. For nominations involving all other GFOs, the Secretaries of the Military Departments

concerned shall forward adverse information about conduct since an officer's last Senate confirmation.

6.2.2. Providing Information to the SASC. The ASD(FMP) shall be the primary spokesperson and conduit for the Department of Defense permitted to discuss adverse information or alleged adverse information with the SASC, or other Senate members or staff, alter a nomination reaches the Senate. This does not prohibit the Military Services from communicating with the SASC, or other Senate members or staff, about a nomination with adverse or alleged adverse information. However, when possible, the Military Services should forward any inquiry from the Senate, its members or staff, concerning matters covered by this subparagraph to the ASD(FMP) for reply. When this is not possible, the Military Services shall provide copies of any written inquiries and responses or summaries of any verbal communications to the ASD(FMP). Additionally, when time permits, these responses shall be coordinated with ASD(FMP) in advance.

6.3. Actions Involving Officers Below General and Flag Officer Grades

6.3.1. General

6.3.1.1. The Secretaries of the Military Departments shall submit promotion board reports to the Secretary of Defense. After the ASD(FMP) approves the board report, the Secretary of the Military Department concerned may make a public announcement. The Secretaries of the

Military Departments shall submit promotion board reports as outlined in enclosure 2.

6.3.1.2. The Secretaries of the Military Departments need not report adverse or alleged adverse information when promotion board reports are submitted for approval by the Secretary of Defense or the President or confirmation by the Senate unless, in the judgment of the Secretary of the Military Department concerned, such action is appropriate in a specific case. If such reporting is appropriate, the Secretary of the Military Department concerned shall submit a summary of the information with the promotion board report as prescribed by enclosure 3.

6.3.1.3. When an officer(s) becomes the subject of an inquiry or investigation after the promotion list reaches the Senate and the Secretary of the Military Department concerned believes it appropriate to delay the nomination pending outcome of the investigation or inquiry, the Secretary of that Military Department concerned shall notify the ASD(FMP). The ASD(FMP) shall then notify the SASC, with the concurrence of the White House and the Executive Secretary of the Department of Defense, as described in subparagraph 6.2.1.7., above. When the investigation or inquiry is complete, the Secretary of the Military Department shall notify the Secretary of the Defense, through the ASD(FMP), as prescribed in subparagraph 6.2.1.8., above.

6.4. Required Documentation for Military Officer Personnel Actions Grades O-1 Through O-10

6.4.1. Consolidation of Actions

6.4.1.1. Actions to be approved by the Secretary of Defense shall not be included with those requiring approval of the President. Selection Board Reports requiring Secretary of Defense approval and Presidential nomination may be combined into a single package. (See enclosure 2.) Similarly, actions not requiring Senate confirmation shall not be included with actions that do. Further, when a Secretary of a Military Department forwards several Selection Board Reports to the ASD(FMP) at the same time, the scrolls shall be combined where appropriate. This shall not be done to combine Active component and Reserve component actions nor to combine actions on O-6 and below and GFO nominations.

6.4.1.2. Summary Sheet. When an action covers a significant number of officers, such as promotion list, appointment lists or multiple board reports, a summary sheet shall be attached to the memorandum indicating the totals by grade and the basis for the action.

6.4.2. Delivery

6.4.2.1. All nominations shall be delivered to the Directorate for Correspondence and Directives, Washington Headquarters Services, Pentagon, for processing

within the Department of Defense and for delivery to the White House.

6.4.2.2. Promotion nominations and actions containing 50 or more names, exclusive of those involving GFOs, that require Senate confirmation shall be submitted to the Office of the Deputy Assistant Secretary of Defense (Military Personnel Policy), Officer and Enlisted Personnel Management, Pentagon, on magnetic tape or floppy disk (preferred medium is floppy disk) in accordance with the format at enclosure 5. Submission of the list on magnetic tape or disk is in addition to, not instead of, submission of hard copies, as required by enclosure 5.

6.4.3. Processing Nominations

6.4.3.1. The timelines at enclosure 4 are the maximum amount of time that shall be permitted to process a nomination from the Secretary of the Military Departments through the Chairman of the Joint Chiefs of Staff and the Secretary of Defense. The processing time at the White House is notional. The Chairman of the Joint Chiefs of Staff shall have 10 duty days to process a nomination. Processing a nomination through the Office of the Secretary of Defense without adverse information shall take a maximum of 18 duty days. Processing a nomination through the Office of the Secretary of Defense with adverse information shall take a maximum of 23 duty days. Some nominations may require additional processing steps, which shall increase the overall processing time in the Office of the Secretary of Defense. (See enclosure 4.) For those

nominations that require those additional steps, the maximum amount of time permitted to process a nomination is 2 additional duty days. If a nomination takes longer to process than permitted by the timelines, the ASD(FMP) shall provide the Secretary of Defense a reason for the delay. Timely submission of nominations by the Secretaries of the Military Departments can help to ensure that they are approved by the desired effective date.

6.4.3.2. Forty-eight hours alter the President signs a nomination or promotion list, the White House Clerk shall forward the nomination or promotion list to the Senate Clerk. This provision is included in this Instruction by agreement with the White House. In those instances where international protocol requires coordination with other governments and/or other agencies, the White House Clerk shall hold those nominations until the Directorate for Correspondence and Directives completes all appropriate coordination. The Secretaries of the Military Departments shall identify those nominations to the ASD(FMP) that involve such coordination under international protocol when submitting those nominations. The Office of the Assistant to the Secretary of Defense for Public Affairs shall announce Presidential nominations as soon as possible after Presidential signature and Military Service coordination.

7. EFFECTIVE DATE

This Instruction is effective immediately.

/s/
John M. Deutch
Deputy Secretary of Defense

Enclosures - 5

E1. GFO Documents Required for Nominations
E2. O-6 and Below Documents Required for Nominations
E3. Adverse Information Cover Sheets
E4. Sample Timeline Normal Processing
E5. Magnetic Tape/Floppy Disk Preparation and Transmittal Procedures

## E1. ENCLOSURE 1

## GFO DOCUMENTS REQUIRED FOR NOMINATIONS

### E1.1. ALL GFOs MILITARY OFFICER PERSONNEL ACTIONS

E1.1.1. The Secretary of the Military Department concerned Cover Memorandum (3 copies).

E1.1.2. Current IG, DoD, check, not more than 60 days old.

E1.1.3. Draft Memorandum to the President (3 copies). One- and two-star military personnel actions shall be prepared for the signature of the Deputy Secretary of Defense. Three- and four-star military personnel actions shall be prepared for the signature of the Secretary of Defense.

E1.1.4. Scroll (3 copies). (See attachments E1.A1. and E1.A2.)

E1.1.5. Resume (3 copies).

E1.1.6. Press release (3 copies).

E1.1.7. Photograph 8-inch X 10 1/2-inch glossy (three- and four-star only).

E1.1.8. The Chairman of the Joint Chiefs of Staff Memorandum.

E1.1.9. Adverse Information Cover Sheets (see enclosure 3).

E1.2. ONE- AND TWO-STAR PROMOTION SELECTION BOARDS

E1.2.1. The Secretary of the Military Department concerned Cover Memorandum (3 copies).

E1.2.2. Current IG, DoD, check on all nominees, not more than 60 days old.

E1.2.3. Draft memorandum to the President (3 copies).

E1.2.4. Scroll (3 copies). (See attachments E1.A1. and E1.A2.)

E1.2.5. Resume (3 copies).

E1.2.6. Press release (3 copies).

E1.2.7. Chairman of the Joint Chiefs of Staff Memorandum.

E1.2.8. Joint Duty Statistics.[1]

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[1] Joint duty statistics are required for nominations resulting from selection boards convened under Section 611(a) of reference (b) for promotions to grades O-4 and above. Provide a listing by category of waivers requested (good of the Service, scientific and technical, professional, tour length, joint equivalent, currently serving). Provide a joint duty assignment projection that explains how the Service intends to provide a joint tour for those officers recommended for good of the Service waivers.

E1.2.9. Acquisition Corps Statistics.[2]

E1.2.10. Ethnic and/or racial profile statistics.

E1.2.11. Promotion Board Proceedings.[3]

E1.2.12. Promotion Board Report for Deputy Secretary of Defense Approval.

E1.2.13. Adverse Information Cover Sheets, if applicable. (See enclosure 3.)

E1.2.14. Copy of the Chairman of the Joint Chiefs of Staff letter designating the joint representative for the Board.

Attachments-2
E1.A1 Flag Officer Scroll Procedures
E1.A2 GFO Scroll Formats

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[2] Acquisition Corps statistics are required for nominations resulting from selection boards convened under Section 1736 of reference (b) for promotions to grades O-4 and above.

[3] Promotion board proceedings include information that is required by DoD Directive 1320.12, Defense Officer Promotion Program.

## E1.A1. ATTACHMENT 1 TO ENCLOSURE 1

## GENERAL AND FLAG OFFICER SCROLL PROCEDURES

E1.A1.1.1. Each nomination package shall contain an original scroll and three copies prepared using the guidance outlined below. Each Service is responsible for requesting scroll paper and maintaining appropriate stock levels.

E1.A1.1.1.1. The first and last pages of the scroll shall be a grade of paper described as "Fine Writing, 100 percent White." The first page of the scroll shall have the appropriate White House letterhead. All scrolls shall be the standard "8 1/2-by-11"size.

E1.A1.1.1.2. Do not use bold type on the scroll. Use the same font throughout the scroll; i.e., a font equal to 10-pitch pica type. "Per line" characters shall not exceed 72 (a space is counted as a character).

E1.A1.1.1.3. The "lead in" of the header shall be flush with the left margin, followed by a colon. The "header" paragraphs shall begin three lines below the "lead in" and shall be single-spaced. The first word in the header paragraph shall be indented five spaces with the first letter of the first word capitalized. Do not capitalize the words "title" (i.e., title 10), "section" (i.e., section 571), and use "U.S.C." when referring to the code. Spell out all Services; e.g., United States Army, United States Air Force, etc. in the "header" paragraph. If the Service

is listed in the "header" paragraph of the scroll, it normally will not need to be reiterated in the remainder of the scroll. One exception is a statutory scroll.

E1.A1.1.1.4. Allow a minimum of 2 inches at the end of any scroll for Presidential signature. If a second page is required, place the text of the first page in a picture frame, allowing a 2-inch margin at the top of the second page, when possible. Scrolls requiring more than two pages shall use 1-inch top and bottom margins on second and succeeding pages as long as the last page allows 2 inches for Presidential signature.

E1.A1.1.1.5. Scrolls of more than two pages shall be numbered; center the page number at the bottom of the page. The page number can be either within the 1-inch bottom margin or 1 inch from the bottom of the page as long as the last name on the page is two lines above the page number. Number the Presidential signature page. If properly placed, this page number will not interfere with the President's signature. When appropriate, use as few pages as necessary, but be consistent in the presentation of the scrolls.

E1.A1.1.1.6. GFO Scrolls:

E1.A1.1.1.6.1. Three- and four-star scrolls:

E1.A1.1.1.6.1.1. "To be (grade)" shall be upper/lower case and underlined.

E1.A1.1.1.6.1.1. (current grade) (name), (SSAN), U.S. (Service) shall be upper/lower case.

E1.A1.1.1.6.2. 1-2-star scrolls:

E1.A1.1.1.6.2.1. "To be (grade)" shall be upper/lower case and underlined.

E1.A1.1.1.6.2.2. (current grade) (name), (SSAN) shall be upper/lower case.

E1.A1.1.1.6.2.3. Names shall be listed alphabetically for Active Duty components and when appropriate for Guard and Reserve components.

E1.A1.1.1.6.2.4. For combined 1- and 2-star scrolls, list each rank separately as above.

E1.A1.1.1.6.3. Examples of retirement, appointment, promotion, statutory and withdrawal scrolls are at attachment E1.A2., enclosure 1.

## E1.A2. ATTACHMENT 2 TO ENCLOSURE 1

## GFO SCROLL FORMATS

GFO SCROLL FORMATS

### Retirement

I nominate:

The following named officer to be placed on the retired list of the (Service, spelled out) in the grade indicated under section (list section) of title 10, U.S.C.

To be General and/or Admiral and/or Lieutenant General and/or Vice Admiral
(current grade) (first, middle initial, last name), 123-45-6789

### Appointment

I nominate:

The following named officer for appointment to the grade of (general and/or lieutenant general and/or admiral and/or vice admiral) in the (Service) while assigned to a position of importance and responsibility under title 10 U.S.C., section (list reference):

To be (grade)
(current grade) (first, middle initial, last name), 123-45-6789

Promotion

I nominate:

The following named officers for promotion in the (Component) of the United States to the grade indicated under title 10, U.S.C., section (list reference(s)):

To be (Major and/or Brigadier General and/or Rear Admiral and/or Rear Admiral Lower half))
(current grade) (first, middle initial, last name), 123-45-6789, (Service)
(current grade) (first, middle initial, last name), 987-56-9840, (Service)
(Names shall be listed alphabetically)

Position specified by statute:

I nominate:

The following named officer, under provisions of title 10, U.S.C., section 8034, to be Position, Service:

To be General
To be Position, Service
(current grade) (first, middle initial, last name), 123-45-6789, (Service)

Withdrawal of nomination:

I withdraw the nomination of:

The following named officer for appointment to the grade of (list grade) while assigned to a position of importance and responsibility under title 10, U.S.C., section 601, which was forwarded on month, day, year:

To be position
To be grade
(Grade) (first, middle initial, last name),
123-45-6789, (Service)

## E2. ENCLOSURE 2

## O-6 AND BELOW DOCUMENTS REQUIRED FOR NOMINATIONS

E2.1.1. Appointments and Reserve Promotions for Grade O-6 and Below

E2.1.1.1. The Secretary of the Military Department concerned Cover Memorandum (3 copies) (for promotion).[1]

E2.1.1.2. Nomination Scroll (3 copies) (see attachment E2.A1.).

E2.1.1.3. Adverse information cover sheets, if applicable (see enclosure 3).

E2.1.1.4. Ethnic and/or racial profile data for Reserve promotions only.

E2.1.1.5. Summary sheet for Reserve promotions only.

E2.1.2. Active-Duty List Promotions for Grade O-6 and Below

E2.1.2.1. The Secretary of the Military Department concerned cover Memorandum.[1] (3 copies.)

E2.1.2.2. Acquisition Corps Statistics for O-5 and O-6. (Ensure there is a statement in the

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[1] The Service cover memorandum should include the proposed release date of board results and the expected date of the earliest promotion.

Secretary of the Military Departments memorandum that states that the Acquisition Corps promotion statistics have been coordinated with the Under Secretary of Defense for Acquisition and Technology.)

E2.1.2.3. Nomination Scroll (O-4 and above only) (3 copies).

E2.1.2.4. Promotion board report.

E2.1.2.5. Chairman of the Joint Chiefs of Staff Memorandum with statistics (when applicable).

E2.1.2.6. Copy of the memorandum for the Chairman of the Joint Chiefs of Staff that designated the joint representative for promotion board.

E2.1.2.7. Ethnic and/or racial profile data.

E2.1.2.8. Summary sheet if forwarding numerous selection boards.

E2.1.2.9. Adverse information summary sheets, if applicable. (See enclosure 3.)

Attachments – 1

E2.A1. O-6 and Below Scroll Formats

## E2.A1. ATTACHMENT 1 TO ENCLOSURE 2

## O-6 AND BELOW SCROLL FORMATS[1-7]

I nominate the following named officers, on the active duty list, for promotion to the grade indicated in the U.S. Army in accordance with section 624 of title 10, U.S.C. The officers identified by an asterisk (*) are also nominated for Regular appointment in accordance with section 531 of title 10, U.S.C.

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1. The first and last pages of the scroll shall be a grade of paper described as "Fine Writing", 100 percent White." The first page of the scroll shall have the appropriate White House letterhead. All scrolls shall be the standard "8 1/2-by-11" size.

2. Use upper and lower case letters for header paragraphs. Use same font for all pages.

3. Type the grade information in upper and lower.case letters and underline.

4. Type the competitive categories in caps and underline.

5. Names must be in caps. Type last name (in alphabetical order), first name and middle initial in a single column. Type the full social security number in a second column. Refer to enclosure 5 of this Instruction on magnetic tape and/or disk formatting.

6. Per line, characters should not exceed 72 (a space is counted as a character).

7. For the last page or signature page, leave at least a 2-inch margin at the bottom.

Lieutenant Colonel

NURSE CORPS

| | |
|---|---|
| ADAM, EDWARD N. | 123-45-6789 |
| ADAMSON-COLE, MARY S. | 234-56-7890 |
| BOWERS, THOMAS N., JR. | 345-67-8900 |

VETERINARY CORPS

| | |
|---|---|
| BROWN, EDUARDO | 567-89-9000 |

Major

ARMY COMPETITIVE

| | |
|---|---|
| ADAMSON, ED* | 678-90-9000 |
| SMITH, RON E. * | 789-90-9001 |

National Guard Officer Nominated for Appointment in the Reserve

I nominate the following-named Air National Guard of the U.S. officers for appointment in the grade indicated in the Air Force Reserve under sections 12203 and 8351(a) of title l0, U.S.C.

Colonel

LINE

| | |
|---|---|
| BRADY, ROGER E. | 222-33-4444 |
| SWANSON-LAND, SUSAN E. | 333-44-5555 |

Presidential Commission of Chief Warrant Officers

I hereby appoint the following Naval Reserve Chief Warrant Officers to be permanent Chief Warrant Officer Four in the United States Navy under section 571(a) of title 10, U.S.C.

Chief Warrant Officer Four

TECHNICAL NURSE

| | |
|---|---|
| SMITH-MILLER, SUSAN | 444-55-6666 |
| ZADORA, PETER | 555-66-7777 |

## E3. ENCLOSURE 3

## ADVERSE INFORMATION COVER SHEET

### E3.1. ADVERSE INFORMATION COVER SHEET

E3.1.1. Grade/Name/Service: Grade, Name, Service.

E3.1.2. Adverse Information: Executive summary of the information.

E3.1.3. Investigating Agency: List the agency that actually conducted the investigation.

E3.1.4. Findings: Executive summary of the information.

E3.1.5. Action Taken: State action taken and by whom. If no action was taken, so state.

E3.1.6. Reasons for Support: State why the Department of Defense and the Military Department concerned support the nomination.

Note: Above information should be on separate page.

### E3.2. ADVERSE INFORMATION COVER SHEET

E3.2.1. What he or she did: Provide a more detailed summary of the adverse information.

E3.2.2. What we did:

E3.2.2.1. Service: Provide detailed summary of action taken. If no action was taken, so state.

E3.2.2.2. OSD: Include the following statement: The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) and the General Counsel of the Department of Defense (GC, DoD) reviewed the summary of the incident. The USD(P&R) elected to support the nomination; the GC, DoD, asserted no legal objection to the nomination.

E3.2.3. Why we support the nomination: State why the Department of Defense and the Military Department concerned should support the nomination.

Note: Above information should be on separate page.

## E4. ENCLOSURE 4

## SAMPLE TIMELINE
## NORMAL PROCESSING

[1] [3]

Chairman

| JCS | OSD | WHITE HOUSE | SENATE |
|---|---|---|---|
| 10 Days | 18 Days | 15 Days | [2] |

NOTE: Nominations encumbered with adverse information can take substantially longer to process that the notional times shown above.

Attachments - 2
E4.A1. GFO Nomination Processing Without Adverse Information
E4.A2. GFO Nomination Processing With Adverse Information

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[1] Does not take into account Service planning and preparation time prior to submission to the JCS.

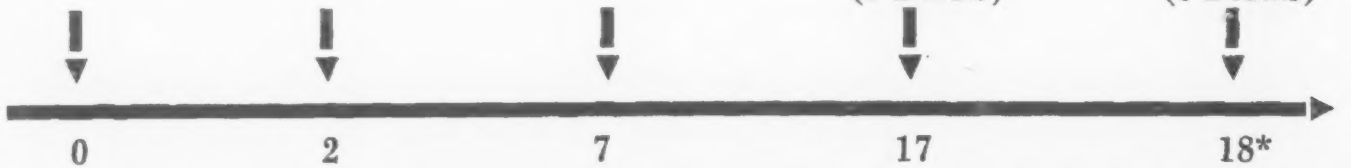
[2] Processing time in the Senate can vary widely depending on such factors as the press of other business and schedule legislative recesses, e.g., Aug., Nov. and Dec.

[3] Additive to this process is the assignment "cascade" effect. For most senior nominations (3- and 4-star), there are numerous associated assignment backfill actions that must take place prior to the actual change at the 3-/4-star level. Depending on decisions whether or not to "gap" billets in the "cascade," this can add up to 30 days to the process after confirmation.

E4.A1. ATTACHMENT 1 TO ENCLOSURE 4

## G/FO NOMINATION PROCESSING
### Without Adverse Information

ASSUMES THE PACKAGE IS COMPLETE AND ACCURATE WHEN RECEIVED




* SOME NOMINATIONS REQUIRE ADDITIONAL PROCESSING STEPS WHICH INCREASE THE OVERALL PROCESSING TIME

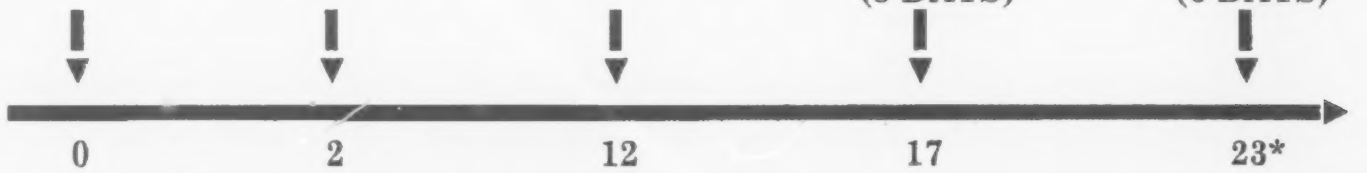
ASD (LA) FOR TAILHOOK '91 ATTENDEES (2 DAYS)
USD (A) FOR ACQUISITION ASSIGNMENTS (2 DAYS)
ASD (RA) FOR RESERVE COMPONENT ACTIONS (2 DAYS)
USD (P) (NATO POLICY) FOR NATO POSITIONS (2 DAYS)

NOTE: Processing days are defined as duty days.

E4.A2. ATTACHMENT 2 TO ENCLOSURE 4

## G/FO NOMINATION PROCESSING
### With Adverse Information

ASSUMES THE PACKAGE IS COMPLETE AND ACCURATE WHEN RECEIVED




* SOME NOMINATIONS REQUIRE ADDITIONAL PROCESSING STEPS WHICH INCREASE THE OVERALL PROCESSING TIME

ASD (LA) FOR TAILHOOK '91 ATTEBDEES (2 DAYS)
USD (A) FOR ACQUISITION ASSIGNMENTS (2 DAYS)
ASD (RA) FOR RESERVE COMPONENT ACTIONS (2 DAYS)
USD (P) (NATO POLICY) FOR NATO POSITIONS (2 DAYS)

Note: Processing days are defined as duty days.

## E5. ENCLOSURE 5

## MAGNETIC TAPE/FLOPPY DISK PREPARATION AND TRANSMITTAL PROCEDURES

### E5.1. PURPOSE

The purpose of this enclosure is to define the requirements governing submission to the U.S. Senate of lists of Executive nominations through the medium of magnetic tape and floppy disk.

### E5.2. SCOPE

This specification shall cover file and record formats, tape-recording and labeling requirements, and transmittal policies.

### E5.3. MAGNETIC TAPE SPECIFICATIONS

E5.3.1. All magnetic tapes of nomination lists must meet the following criteria. When more than one option is shown, the first is the preferred option.

E5.3.2. If the submitting Agency is able, it shall provide internal tape labels meeting one of the following standards:

E5.3.2.1. EBCDIC (IBM MVS/VSE/VM).

E5.3.2.2. ASCII.

E5.3.3. If it is not possible to supply labels, the first record on the tape must be an identification record in a format mutually agreeable to the submitting Agency and the Department of Defense.

E5.3.3.1. TRACKS - 9.

E5.3.3.2. RECORDING DENSITY:

E5.3.3.2.1. 6250 bpi.

E5.3.3.2.2. 1600 bpi.

E5.3.3.3. Dataset Name. Dataset names may be assigned at the discretion of the submitting Agency. A preferred format is DSN=LGA.NOM., in which represents the submitting Agency, such as the U.S. Air Force or the U.S. Navy.

E5.3.3.4. When a dataset name is selected by the submitting DoD Component, it must remain constant for all tapes submitted by that Component. That provides proper controls and prompt return of tapes to the original owners. For non-labeled tapes, the tape identification record shall contain the equivalent information.

E5.4. FLOPPY DISK SPECIFICATIONS

E5.4.1. Medium. The preferred physical floppy disk is 3 1/2 inch; if necessary, the 5 1/4 inch floppy is acceptable.

E5.4.2. Density. For a 3 1/2 inch, 1.44MB is preferred. If necessary, 720KB is acceptable. For a 5 1/4 inch, 1.2MB is preferred. If necessary, 360KB is acceptable.

E5.4.3. Compatibility. IBM-compatible PC process ability is required.

E5.4.4. Format. See "Magnetic Tape Preparation" section E5.3. and Transmittal Procedures for details.

E5.4.5. File(s). Files must be in "ASCII" format, not "WordPerfect," "Wordstar," etc. If there are multiple lists, each one can be a separate file on the floppy, as opposed to one list for each floppy. Put as many lists as will fit on each floppy before continuing on subsequent floppies.

E5.4.6. If possible, a file transfer download from a mainframe or mini computer to a PC can be done to transfer a list to a floppy. This method is optimal because most data centers have had tape processing in place for many years (with little or no problems) and would eliminate having to process a list under two environments.

E5.5. RECORD ENTRIES

Records shall be fixed length, 72 characters long. Blocked records are preferred for tapes, but this left to the discretion of the submitting DoD Component. Several record types shall be used, as identified by a code in positions 1 and 2 of the record. A detailed description of each record type follows. Actual record formats are shown in attachment E5.A1.(Figure 1, Record Formats).

E5.5.1. Code AA - Record. Used when the submitting DoD Component is unable to provide a standard label tape from IBM mainframe Environment (MVS/VSE/VM). It contains the equivalent of a dataset name that can be checked by the tape-processing program. There shall be no more than one of these records per tape, and it shall appear first on the tape.

E5.5.2. Code 01 - Control Record. Contains the submitting DoD Component's name (DoD reference number "DE-NM") and the count of nominees on the list. The count of nominees must be right justified. If multiple lists are submitted on one tape, there must be a control record for each.

E5.5.3. Code 99 - Message Text Record. Contains the text of the message submitting the nomination, excluding the words "I nominate." If multiple records are required for the full message, each shall contain the record code in positions 1 and 2. No "99" record shall terminate in a partial word.

E5.5.4. Code 88 - Organizational Unit Record. Contains the name of the group within the submitting organization that pertains to the immediately following nominees, such as "Medical Service Corps" or "Chaplain." That field may be used to force subheadings within a single nomination list, such as the "Army Promotion List."

E5.5.5. Code 77 - Position Record. Contains the rank (DoD reference number "GRAA") or position to which the immediately following names are being nominated, such as major or captain.

E5.5.6. Code 66- Nominee Record. Contains the last name of the nominee in one field, the first name and middle initial in a second field (DoD reference number "NA-RG"), and the suffix "Jr." or "Sr." in a third field. The fourth field, social security number (SSAN) or modular number (last four digits of the SSAN) is optional (DoD reference number "SO-CA").

E5.6. MULTIPLE NOMINATIONS LISTS

A single disk may be used to transmit more than one list of nominations. Tapes should only have one list each.

E5.7. TRANSMITTAL TO THE DEPARTMENT OF DEFENSE

E5.7.1. Floppy disks or magnetic tapes of nomination lists submitted to the Department of Defense are identified by an external sticker label. Additionally, either an internal tape label or an identification record is required to permit program-controlled tape-checking during processing of tape(s).

E5.7.2. A transmittal document must accompany the tape. The format of that document is left to the submitting DoD Component, but must include at least the following:

E5.7.2.1. The name of the submitting DoD Component.

E5.7.2.2. The number of different nomination lists included on the tape.

E5.7.2.3. The external label information.

E5.7.2.4. The return address or instructions for returning the tape.

E5.8. TAPE AND DISK CONTROL

Tapes and disks submitted to the Department of Defense remain the property of the submitting DoD Component, and shall be promptly returned following their use. While in the possession of the Department of Defense, they shall be monitored by dataset name and serial number and remain under DoD control until the President has approved and signed the hard copy.

Attachments - 1

E5.A1. Actual Record Format

E5.A1. ATTACHMENT 1 TO ENCLOSURE 5

ACTUAL RECORD FORMAT

<----------Positions 1-72---------->

0000000001111111111222222222233333333334444444444555555555566666666667771234567890123456789012345678901234567890123456789012345678901234567890123456789012

TAPE IDENTIFICATION RECORD

| | |
|---|---|
| AAReserve of the Army Promotions and Appointments | |
| 1 3 | |

CONTROL RECORD

| | COUNT |
|---|---|
| 01United States Army | 000279 |
| 1 3 | 6 6<br>1 7 |

MESSAGE TEXT RECORD

| |
|---|
| 99The following named officers for promotion in the Reserve of the |
| 1 3 |

ORGANIZATIONAL UNIT RECORD

| |
|---|
| 88Army Promotion List |
| 1 3 |

POSITION RECORD

77Colonel

1 3

NOMINEE RECORD

| LAST NAME | FIRST NAME & MI | SUF. | SSN |
|---|---|---|---|
| 66Clay | Brent A | Jr. | 407 44 3985 |
| 1 3 | 3<br>1 | | 5 6<br>8 1 |